78-73

No.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, A.D. 1978

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, et. al.,

Petitioner,

vs.

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Respondents

JURISDICTIONAL STATEMENT TO THE UNITED STATES SUPREME COURT

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JURISDICTIONAL STATEMENT TO THE UNITED STATES SUPREME COURT

INTRODUCTION

Pursuant to Rules 13 (2) and 15 of the Rules of the Supreme Court of the United States, appellants, John Wright d/b/a/ Touch of Class Massage Parlor; Mary K. Gilbert; Mary Jo Kocher; and Karon Griffin, et al., file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of Indiana in this case and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the Indiana Supreme Court appears in _____ Volume of Indiana Reports at page _____; and _____Volume of Indiana Decisions at page _____; 371 Volume of North East 2nd at page 1298; the same to be cited as City of Indianapolis: William Hudnut, as Mayor of the City of Indianapolis, Fred L. Armstrong, as City Controller of the City of Indianapolis, vs. John Wright d/b/a Touch of Class Massage Parlor; and

Mary K. Gilbert, vs. Mary Jo Kocher, vs. Consolidated City of Indianapolis, vs. Karon Griffin, et al. (1978), ____ Ind. ____, ____ Ind. Dec. ____, 371 N.E. 2nd 1298. Said opinion and a copy thereof is included herein as Appendix "A".

GROUNDS OF JURISDICTION OF THE SUPREME COURT

This appeal arises from an action for a Declaratory Judgment and Permanent Injunction filed by your petitioners in the Superior Court of Marion County, Room No. 7. Said action in the case of John Wright, et al. vs. City of Indianapolis was filed on the 14th day of October, 1976, and the case of Karon Griffin, et al. v. Consolidated City of Indianapolis was filed on the 15th day of October, 1976. A temporary restraining order was issued, and subsequent to a hearing pursuant to a hearing pursuant to Indiana Rules of Trial Procedure 65 (a) (2) the Trial Court granted the Permanent Injunction and Declaratory Relief prayed for in the petitioner's complaint. Said judgment was granted on the 25th day of October, 1976, an entry being made granting the injunctive relief in the

case of John Wright, et al. v. City of Indianapolis. On the 26th day of October, 1976, a judgment entry was entered granting the relief prayed for by the plaintiffs in the case of Karon Griffin, et al. v. Consolidated City of Indianapolis, granting said injunctive and declaratory relief.

On November 12, 1976 your respondents filed its Motion to Correct Errors, which was responded to by your petitioners herein and on December 13, 1976, the City of Indianapolis filed a praecipe for transcript and notice of appeal which was teimyl filed with the Court of Appeals in Indiana.

Issues were closed by the Indiana Supreme Court, and final judgment entered and effective March 10, 1978, upon denial of petitioner's petition for stay, petition for rehearing and petition for remand.

This jurisdictional statement is being filed within ninety (90) days of final judgment.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257 (2).

Cases that sustain the jurisdiction of this

Court include:

1. Barlow's Inc. v. Usury (D.C. Idaho 1976), 424 F. Supp. 437.

2. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886)

3. Camera v. Municipal Court, 376 U.S. 523, 18 L. Ed. 2nd 930, 87 S. Ct. 1727 (1967)

4. Cheek v. Charlotte (1968), 273 N.C. 293, 160 S.E. 2nd 18

5. Cian Ciolo v. Members of City Counsel, Knoxville, Tennessee (E.D. Tenn. 1974) 376 F. Supp. 719

6. City and County of Denver v. Nielson (1977), 572 P. 2nd 484

7. Colorado Springs Amusements Ltd. v. Rizzo, 524 F. Supp. 371 (3rd Cir. 1975)

8. Corey v. City of Dallas (N.D. Tex. 1972), 352 F. Supp. 977

9. Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L Ed. 2nd 274

10. Ex Parte Macky, 56 Cal. App., 2nd 635, 133 P. 2nd 64 (1943)

11. Fehleber v. Thompson (1974) E.D. N.C. -- Civil Docket No. 1031

12. Griswold v. Connecticut, 318 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2nd 510 (1965)

13. Hogge et al v. Hedrick, et al., 391 F. Supp. 91 (1975)

14. J. S. K. Enterprises, Inc. v. Lacey (1971), 6 Wash. App. 43, 492 P. 2nd 600

15. Kisley v. City of Falls Church (1972), 212 Va. 693, 187 S.E. 2nd 168 Cert. Denied 409 U.S. 907

16. Lancaster v. Municipal Court for Beverly Hills (1972) 6 Cal. 3rd 805, 100 Cal. Reptr. 609, 494 P. 2nd 681

17. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 2nd 937 (1905)

18. McLaughlin v. Florida, 379 U.S. 184, 12 L. Ed. 2nd 222, 85 S. Ct. 283 (1964)

19. Monell v. Department of Social Service of the City of New York (D.C. N.Y. 1972) 257 F. Supp 1051

20. New York Ice Company v. Liebman, 285 U.S. 265, 52 S. Ct. 371, 76 L. Ed. 747 (1932)

21. Patterson v. City of Dallas (1962), 355 S. W. 2nd 838 (Tex. Civ. App) Cert. Denied 372 Y.S. 257.

22. State Board of Barber Examiners v. Cloud, (1942) 220 Ind. 550 44 N.E. 2nd 972

23. Street v. Barney Electrical Supply Company, (1903), 160 Ind. 338, 6 N.E. 895

Cite the following:

Indianapolis City-County General Ordinance #110, 1976 amending Chapter 17 of the Code of Indianapolis of Marion County, 1975. See Appendix "A".

QUESTIONS PRESENTED

The questions presented on the appeal of this

Court are as follows:

1. Whether the Court below improperly ruled that a massage parlor ordinance prohibiting opposite sex massage is not violative of due process or equal protection provisions of Federal or State Constitutions.

2. Whether the Court below improperly ruled that as member of a regulated business, a licensee impliedly consents to inspection at any and all reasonable times and places by obtaining a license.

3. Whether the Court below erred in ruling that they would not presume that City officials wound conduct inspections of massage parlors in a manner other than a Constitutional manner.

4. Whether the court below improperly ruled that the administration inspection scheme authorized by the massage parlor ordinance was not unreasonable nor in contravention of prohibitions of State or Federal Constitutions. Whether the Court improperly ruled that it was unnecessary to pursue your petitioner's various Constitutional arguments pertaining to the constitutionality of opposite sex massage ordinances as violative of the due process and equal protection provisions of the Indiana and Federal Constitutions.

5. Whether it is a violation of the equal protection clause of the 14th Amendment to the United States Constitution for a municipal ordinance to pro hibit employees of massage parlors from treating members of the opposite sex.

6. Whether the Court improperly ruled that the City did not engage in a conclusive presumption that massage of the opposite sex will cause social and moral problems, and lead to illicit and illegal sexual activities.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

In two cases, the Superior Court of Marion County, Gerald S. Zore, Trial Judge, determined that a city massage parlor ordinance is unconstitutional, and appeals thereon were consolidated by the Indiana Supreme Court.

Both cases which are consolidated by the Indiana

Supreme Court were initiated by complaints for Temporary Restraining Order, Permanent Injunction, and Declaratory Relief. The Trial Court, subsequent to a hearing granted the Permanent Injunction and Declaratory Relief prayed for. The Trial Court's judgment determined that the massage parlor ordinance at issue here was uncontitutional. The Trial Court also found, more specifically, that the state law of Indiana had preempted the municipal legislation concerning criminal sexual activity, making the ordinance an attempted local law prohibited by the Indiana Constitution. The Trial Court also found the ordinance violative of the due process and equal protection provisions of the Indiana Constitution and the prohibition against unreasonable searches and seizures of both the Indiana and the United States Constitutions.

Upon appeal and consolidation, the issue was raised by the City of Indianapolis that Federal Constitutional questions were not present. This issue was contested by your petitioners, in that the issue had been raised in the Trial Court, and

that contentions that violations of the due process and equal protection provisions of the Indiana Constitution were also contestation of the same or similar provisions of the Federal Constitution.

The Indiana Supreme Court, in their opinion, referred to the Federal Constitutional provisions concerning due process and equal protection, and at one point in said opinion stated that it was unnecessary to pursue the parties various constitutional arguments concerning opposite sex massages. The Indiana Supreme Court relied on Federal cases interpreting provisions of the Federal Constitution concerning equal protection and due process, and the issues under the Federal Constitution concerning equal protection and due prócess were raised at the Trial Court level and throughout the appellate procedure by your petitioners. Federal questions concerning criminal search and seizure under provisions of the 4th Amendment of the United States Constitution were also raised at the trial level by complaint and included in the Trial Court's judgment. Such issues were preserved and raised upon appeal and passed upon

in its judgment by the Indiana Supreme Court.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, that is herein after described, in that the City of Indianapolis massage parlor ordinance herein referred to, and set down in full Appendix "A", violates the equal protection and due process provisions of the United States Constitution, and certain sections of said ordinance violate the provisions against unreasonable searches and seizures set forth in the 4th Amendment of the United States Constitution.

The clause referred to concerning opposite sex massage in the City-County General Ordinance #110, an amendment of the City Code of Indianapolis, Chapter 17, states:

> "Chapter 17 (c) - No person holding a license under this chapter shall administer to a person of the opposite sex, any massage, alcohol rub, or similar treatment, foam bath, or electric or magnetic treatment except upon the signed order of a licensed physician, osteopath, chiropractor, podiatrist, or registered physical therapist. A person shall neither cause nor permit in or about his place of business or in connection with his business, any agent, employee, servant, or other individual to administer any such treatment to any individual of the opposite sex."

Cases similar to this one have been the subject to extensive litigation in various jurisdictions as numerous municipalities and counties have sought to regulate "massage parlors" and presumed vices found in connection of the operation of the "parlors". The constitutionality of these various provisions has been attacked in many jurisdictions with varying results. Many State Supreme Courts which have ruled on this questions have upheld the prohibitions of "bi-sexual" massages while many Federal District Courts have issued injunctions preventing enforcement of local ordinances containing such prohibitions. The resulting uncertainty of the law because of the varying decisions on the subject throughout the United States has created much confusion for all political subdivisions and law enforcement authorities and for the owner-operators of these "massage parlors" which are legitimate businesses within the State of Indiana, and the same confusion has inhibited the exercise of municipal powers, and inhibited the exercise of what your petitioners claim to be their inherent right to

practice a legitimate profession and engage in a livelihood.

The matter of regulation of massage parlors and prohibition of bi-sexual massage should be reviewed by the Supreme court of the United States for many reasons. It presents many questions of importance in Constitutional law regarding the equal protection and due process provisions of the 14th Amendment of the United States Constitution, and the search and seizure provisons of the 4th Amendment of the United States Constitution, and it deals with problems of law enforcement and legislative power important to municipal authorities. The case law in this area shows that many states have attempted to resolve questions by litigation, and many other states have attempted to resolve questions by litigation, and many other states have municipalities within their boundaries which have passed or attempted to pass the regulation of bi-sexual massage ordinances. These jurisdictions include: Alabama, California, The District of Columbia, Illinois, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee,

Texas, Virginia, Washington, Wisconsin, Colorado and Indiana. The result has been, as set forth previously, confusion.

The petitioners would point out to the Court another very important facet and reason for the Supreme Court to assume jurisdiction of this case. Of the cases cited above conferring jurisdiction on the Supreme Court, many are State and Federal Court cases concerning regulatory schemes such as this regulating massage parlors decided in the different states. As will be noted later on, and set forth herein, the State and Federal Courts have decided this question differently. The result of these various decisions and these various jurisdictions simply means that the 14th Amendment rights concerning due process and equal protections, and 1st and 4th Amendment rights concerning the right of privacy, and the right to be free from unreasonable searches and seizures change drastically as individual citizens of the United States cross State lines. The Indiana Decisions set out that there are no violations of the 14th Amendment concerning equal protection and

due process and no violations of right of privacy or illegal search and seizure under the 4th Amendment. The petitioners refer the Court to the Case of City and County of Denver v. Nielson (Supra), a case also decided in 1977. In this case, the Colorado Supreme Court held that there were violations of equal protection and due process provisions. This simply means that individuals are subject to different standards of due process and equal protection under the Constitution in one State that they are in another. The initial intentions of our founding fathers in creating the United States Constitution, and of the people in this country in amending the same and including the 14th Amendment was to provide uniform, guaranteed constitutional rights to all citizens of this country. The various and sundry decisions of the State and Federal Courts interpreting equal protection and due process guarantees under these massage parlors regulatory schemes is doing nothing more than scattering the intent of the 14th Amendment from State to State.

The United States Constitution is a document

governing and guaranteeing rights to each and every citizen of the United States. It is the purpose of the Supreme Court to set forth these rights is particularity and uniformity so that the same governs the liberties of all citizens. If different State Courts and Federal Courts throughtout the union can interpret the 14th Amendment in different ways, then individual rights are being infringed from one State to another. The 14th Amendment was not made to be stretched to citizens of one State and not to citizens of another. The rights guaranteed under the United States Constitution are common and extend to all citizens, and interpretation of the same would be on a national level in order to insure these guaranteed rights and privileges are afforded to all and not infringed.

The petitioner in its jurisdictional statement, by the citing of cases which show that this case should be heard by the United States Supreme Court, has set out many of the decisions of the varying State Courts and the Federal District Courts which have heard litigation arguments concerning the pro-

hibition of bi-sexual massage. These cases only help to illustrate the confusion that exists in this area, and the lack of understanding on the part of municipalities and private individuals as to where their rights stand concerning "massage parlors" and bi-sexual massages. It is the petitioners' contention that massage parlor ordinances such as this concerning the prohibition of a bi-sexual massage deny basic fundamental rights guaranteed to them by the United States Constitution, and feel that the only authority which could settle the issue and avoid the confusion throughout the nation conerning these "ordinances" is a decision by the United States Supreme Court interpreting such sections of these municipal regulations.

The first case of any significance to deal with the constitutionality of such a clause which prohibited commercial massage by persons of the opposite sex was Ex Parte Maki, 56 Cal. App., 2nd 635, 133 P. 2nd 64 (1943). At that time in upholding the validity of the prohibition, the California Court stated the following:

"The ordiance applies alike to both men and women. If petitioners should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, these would be no violation. The barrier errected by the ordinance against immoral acts likely to evolve from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the City Council in the fair exercise of the police power.

. . . Moreover, the fact that a particular transaction considered apart from the menace sought to be prevented (innocuous), does not immunize it from the prohibition contained in the enactment. Since the ordinance in question does not prohibit either men or women from engaging in the occupation of the masseur but merely regulates the conduct of a business in the interest of the State, there is no infraction of Article 20 of the "California" constitution.

. . . The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive the person so engaged of his property. The language of the ordinance and the evils intended thereby to be prevented make it clear that the intent of the City Council was solely to serve the public welfare and not to oppress any class. The fact that a person by his occupation may be unable to gain certain profits as a result of the enforcement of regulatory measure is not a deprivation of his property without due process of law. Enactments that curve the vicious or restrain the wicked

necessarily restrains the emoluments of his interprise. However, such results are not to be considered in determining the validity of a law. . . 133 P. 2nd at 67-69."

It should be noted, however, that Ex Parte Maki (Supra) was overruled by the California Supreme Court in the case of Lancaster v. Municipal Court for Beverly Hills, 6 Cal. 3rd 805, 100 Cal. Rptr. 609, 494 P. 2nd 681.

These cases were followed by Patterson v. City of Dallas, 355 S.W. 2nd 838 (1962), in which the Texas Supreme Court upheld a similar ordinance. Later, the same Dallas ordinance was declared unconstitutional by the Federal District Court in the case of Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972).

Then, in 1968, the North Carolina Supreme Court decided in Cheek v. City of Charlotte (1968), 273 N.C. 293, 160 S.E. 2nd 18, which approved an ordinance similar to the one in question. Subsequent to that decision, other parties successfully brought an action in Federal District Court for a permanent injunction restraining enforcement of a similar

ordinance by Cumberland County, North Carolina, in the case of Fehlhaber v. Thompson (1974), Civil No. 1031, E.D.N.C. (unreported).

In 1971, the Court of Appeals for the State of Washington in J. S. K. Enterprises, Inc. v. City of Lacy (1971), 493 P. 2nd 600, held that same bi-sexual massage prohibition unconstitutional as discrimination on the basis of sex. The Washington Court stated that it refused to follow the doctrine of Ex Parte Maki (Supra), in holding unconstitutional an ordinance prescribing masseuses to administer massages only to customers of their own sex, but containing the provision that a person of the opposite sex may administer treatment in good faith in the course of practice of any healing art of profession. The Court in J. S. K. Enterprises, (Supra) pointed out that the ordinance went beyond the objective of protecting the public from lewd acts in massage parlors, in holding that under the guise of regulation it denied all masseuses the right to treat members of the opposite sex.

As can be seen from the table of cases cited as conferring jurisdiction upon this Court, many

cases have come before the State and Federal Courts with varying results and no firm decision nor consistency among any to inform individuals and municipal corporation of their rights or remedies pursuant to these ordinances. For this reason, your petitioners contend that the Supreme Court should assume jurisdiction of this cause and decide the same.

Your petitioners contend, as set out above, that the ordinance in question denied due process rights guaranteed by the United States Constitution.

The Trial Court below, in its finding in subsection (f) of the judgment entry, stated:

> "The only reason advanced by the City of Indianapolis and its tendered evidence for the recent adoption of section 17-729 (e), (f), (h), and (i), is that it is an attempt by the City to prevent illicit sexual conduct between individuals of the opposite sex."

Petitioners contend that such a conclusive presumption on behalf of the respondents is in itself violative of the due process guarantees granted to the petitioners. By reason of the City indulging in this conclusive presumption, the petitioners are denied individual liberty and

property rights without due process of law in violation of the 14th Amendment of the United States Constitution. The City in this cause presented no further proof of illicit sexual activity going on in the petitioners' establishments and there has been such a conclusive presumption which effectively denies the petitioners' right to participate in a legitimate occupation or secure a living as guaranteed by the Bill of Rights in the Indiana Counstitution and the right to engage in a lawful business or profession within the protection of the 14th Amendment of the United States.

In this particular instance, it was shown at the Trial Court level, and on appeal, that reasonable alternatives are available whereby due process rights can be afforded to the petitioners through the City's licensing process, and the City's policing process, in order to avoid any violations of fundamental rights. In such a case, where a conclusive presumption is taken by the City, and based on insufficient and nonexistent evidence the same is unwarranted and unconstitutional. The fact that reasonable alternatives

exist render the ordinance and these provisions unconstitutional and violative of the equal protection and due process guarantees of the 14th Amendment of the United States Constitution. Griswold v. Connecticut 318 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2nd 510 (1965); Lochner v. New York 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

The City in this case has very reasonable alternative methods of protecting the public and assuring that illicit and illegal sexual activity did not take place in these various establishments. State laws have been established governing illicit and illegal sexual activity, and enforcement of the same by the municipal bodies would insure the public health, safety and welfare, and insure that such activities did not take place within the regulated establishments.

The petitioners also contend that the proper test in this cause for determining if the ordinance denies the equal protection guarantees of the United States Constitution is that of a "compelling state interest". The Indiana Supreme Court did not directly

address this issue nor determine the proper basis or test for determining the violation of equal protection rights in this case. The rights denied by the City's ordinance in question herein, are the right to personal liberty and the right to earn a livelihood and to participate in a legal and legitimate operation. Such rights are fundamental rights. The petitioners also contend that the ordinance herein creates a classification based on sex, which has been held to be a suspect class. Monell v. Department of Social Services of the City of New York (D.C. N.Y. 1972), 357 F. Supp. 1051. As such, these violations require the application of a "compelling state interest" test.

The right to engage in a lawful business or profession has been held to be a fundamental right by the United States Supreme Court. As stated by the United States Supreme Court in New York Ice Company v. Liebman, 285 U.S. 265, 52 S. Ct. 371, 76 L. Ed. 747 (1932):

> "The right to engage in a lawful business or profession without arbitrary restraints is a "fundamental right" within the protection

of the 14th Amendment."

The above quoted section of the Municipal Ordinance prohibiting a person holding a license under the Act to administer to a person of the opposite sex any massage, effectively denies the parties herein from engaging in a legitimate occupation, practicing their profession, or earning a livelihood. Such a provision denies the individual the right to personal liberty, and the right to pursue and earn a livelihood. In addition, the City is engaging in a conclusive presumption as to illegal activity within a legitimate business, and as such, denying certain rights and privileges to the petitioners without due process of law.

Your petitioners do not contend that they have a right to operate a business free from any regulation by the State or their municipality. They simply argue that they do have a fundamental right to operate a business and pursue a livelihood and engage in a legitimate profession free from arbitrary, and unreasonable regulations and restraints. The ordinance complained of herein is not a reasonable

regulation of a legitimate business. It is an arbitrary and discriminatory regulation designed to effectively regulate the petitioners out of business and to deny them the right to practice their chosen profession. Because the individual right to engage in a lawful business is a fundamental right, such alone mandates the application of a compelling state interest test. The respondents, neither in the Court below nor throughout the appellate process have established any substantial, compelling state interest in such a prohibitive measure as regulating and prohibiting bisexual massage. If such a substantial compelling state interest cannot be shown by the City then the ordinance in question must fall as violative of guaranteed equal protection and due process rights guaranteed to your petitioners under the provisions of the United States Constitution. The ordinance in question does not in any way nor in reality relate to nor is it appropriate to secure the end in view as set forth by the City. The prohibition of illicit sexual activity is already prohibited

under state law, and these are the reasonable alternatives available to the respondent in regulating such activity. The violation of basic constitutional rights cannot be tolerated when such reasonable alternatives exist.

To determine which test is to be applied in the given circumstance, the United States Supreme Court in the case of Dunn v. Blumstein, 405 U.S. 330 92 S. Ct. 995, 31 L. Ed. 2nd 274 (1972), suggested that the following three factors be considered:

(1) Character or basis of discrimination

(2) Interest of the individual subject to the discrimination

(3) The government interest at stake

If the facts of the particular case should reveal that either the basis of the classification is suspect, and/or the class of persons discriminated against is deprived of fundamental rights, then a compelling state interest and not a mere rational relationship between the State and the objective must be established to make legislation constitutionally valid. As set forth above, the right to engage in a livelihood is a factor of personal

liberty and a fundamental right under the provisions and auspices of the 14th Amendment of the United States Constitution. As such, the "compelling state interest" test is the appropriate test to be applied in this circumstance. The evidence in the Trial Court in this matter showed conclusively that the only employees in massage parlors within the City of Indianapolis are female. The evidence also showed that the majority of their customers are male. The enforcement of the regulation prohibiting bi-sexual massages as set forth in this ordinance effectively denies these employees the right to engage in a livelihood or earn a living. Such a classification as made by this ordinance denies the opportunity to engage in a chosen profession with both sexes, simply because the City is operating under the conclusive presumption that some may violate the morals of the community. Such a classification as this is clearly arbitrary, capricious and contrary to the law and provisions of the United States Constitution. A conclusive presumption as to a certain class of people and a lawful occupation cannot be upheld, as such is the denial of fundamental rights. The

State of Indiana has seen fit to regulate the moral and illicit sexual activity by way of plain and unambigious state laws, and these exist as reasonable alternatives to the violations of the petitioner's fundamental rights.

Your petitioners herein also contend that the above described ordinance regulating and prohibiting bisexual massage discriminates on the basis of sex. Sex has been held to be a suspect classification (Monell v. Department of Social Services of City of New York (Supra)), and the evidence in this cause firmly establishes that the only employees regulated and prohibited from bisexual massage in the City of Indianapolis are females. As such, the same is an invidious discrimination based upon sex in violation of the provisions of the United States Constitution and various federal laws.

The petitoners also contend that certain provisions of the Indianapolis City Ordinance as amended and set out in Appendix "A" violate constitutional guarantees against unreasonable searches and seizures found in the 4th Amendment of the Constitution of

United States.

Chapter 17-729 of the Municipal Code in question states in pertinent part:

> "(j) Every massage school, massage parlor, massage therapy clinic, or bathhouse shall be open for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors, and duly authorized representatives of the City Controller upon the showing of proper credentials by such persons.
>
> (k) Any bathhouse, massage parlor, massage therapy clinic, massage therapy school, or any combination thereoff is prohibited from installing or maintaining any lock or similar devise on the inside of any door of said business which cannot be operated by key or knob from the exterior of said door."

The 4th Amendment protects certain privacy rights which individuals have in their persons, personal effects and their homes. Boyd v. U.S., 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). Your petitioners contend, and the Trials Court held below, that certain provisions of the municipal code as set forth above violate their right of privacy, and the right to be secure in their homes and places of employment, and violate provisions against un-

reasonable searches and seizures.

The United States Constitution provides a right of privacy in association. The 1st Amendment imposes limitations upon governmental abridgment of privacy in one's associations. Gibson v. Florida Legislative Investigation Committee, 372 U. S. 539, 9 L. Ed. 2nd 929, 83 S. Ct. 889; Griswold v. Connecticut (Supra); Katz v. United States, 389 U. S. 347, 19 L. Ed. 2nd 576, 88 S. Ct. 507. The right of privacy is not only implicit in the concept of liberty within the due process clause of the 14th Amendment of the United States Constitution, but privacy is also a 1st Amendment right under the United States Constitution. This has been previously set forth by the above citations. Because of the basic fundamental right of privacy and association, the compelling state interest must be shown before any such right can be abridged as the same is attempted by the above quoted provisions of this ordinance. This has not been done, and the plaintiffs contend that the State or City has not at the trial lever nor through the appellate process shown such a substantial state or governmental

interest which would override these basic constitutionality guarantees.

Municipalities, as with police officials, in order to make reasonable, unconsented to searches and inspection must comply with the probable cause test of a warrant, and the neutral magistrate requirements of the 4th Amendment. Such safeguards are required and mandated by the 4th Amendment to insure that the governmental interest is not asserted lightly in the face of constitutionally protected privacy interests. These privacy interests apply to the petitioners in their individual and business capacities.

The practical effect of the enforcement of these provisions as above quoted of the municipal ordinance leaves the employees and owners of these establishments at the mercy of the discretion of any official representing the municipality. It is contended by the petitioners that there has been shown no urgent or substantial governmental interest or overriding public interest which would authorize such unconsented to searches.

There has been contentions at the appellate court level that since consent to said searches is a requirement for the issuance of a license, that such searches would be legal on the basis of the petitioners' consent hereto.

The Indiana Supreme Court in their opinion, at 371 N.E. 2nd 1298, 1302, stated:

> "It is a business which is being inspected and one which has a history of regulation, Annot. 17 ALR 2 nd 1183 (1951), albeit not as extensive as the liquor or fire arms industries, and as a member of regulated business, a licensee does impliedly consent to inspections at any and all reasonable times and places by obtaining a license, . . ."

It is the petitioners' contention that this reasoning by the Indiana Supreme Court is in violation and contradiction of decisions of the United States Supreme Court, and in direct contradiction with the intent and purposes of the 4th Amendment of the United States Constitution. The petitioners contend that the forcing of such consent by the municipality in order to engage in a lawful and legitimate occupation is violative of the 4th Amendment in itself, and a violation of the due

process guarantees of the 14th Amendment.

Search and seizure principals founded under the criminal law interpreting the 4th Amendment of the United States Constitution, do extend to civil inspection and search provisions.

In Camera v. Municipal Court, 378 U.S. 523, 18 L. Ed. 2nd 930, 87 S. Ct. 1727 (1967), the United States Supreme Court stated in holding that a civil inspection authorization was unconstitutional:

> ". . . The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The 4th Amendment thus gives concrete expression to a right of the people which "is basic to a free society."
>
> ". . . One governing principle, Justified by history and by current experience, has consistently been followed: except in certain carefully defined classed of cases, a search of private property without proper consent in unreasonably unless it has been authorized by a valid search warrant.
>
> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the rule, to be decided by a judicial officer not by

a policman or government enforcement agent.

". . . But we cannot agree that the 14th Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the 4th Amendment only when the individual is suspected of criminal behavior.

". . . inspections of the kind we are here considering do in fact jeopardize "self-protection" interests of the property owner.

". . . Under the present system, when the inspector demands entry, the occupant has now way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself in acting under proper authorization.

". . . Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search.

". . . The practical effect of this system is to leave the occupant subject to the descretion of the offical in the field. This is precisely the descretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

". . . In assessing whether the public

interest demands creation of a general exception to the 4th Amendment's warrent requirement, the questions is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purposes behind the search.

"It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.

". . . In summary, we hold that administrative searches of the kind at issure here are significant intrusions upon the interest protected by the 4th Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the 4th Amendment guarantees to the individual, and that the reasons put forth in Frank vs. Maryland and in other cases for upholding these warrantlesss searches are insufficient to justify so substantially a weaking of the 4th Amendment's protections."

It is the petitioners' contention therefore, and they believe it is clear through the Supreme Court's interpretation of the 4th Amendment and the decision in Camera (Supra), that the 4th Amendment guarantees pertaining to rights of privacy and freedom from illegal searches and seizures apply to civil inspection requirements, and that a warrant

and probable cause are needed before such unreasonable inspection and search may be conducted. It must also be noted that the inspecions herein are and can be done by police officers and the sheriff's department of the City of Indianapolis, County of Marion, and criminal action can be levied by reason of arrest after the search, if any lawful conduct may be in any way discovered. The Supreme Court of Indiana, in their opinion, held on page 1302 that:

> "No criminal prosecutions are authorized for the refusal to permit inspection, only the license is effected."

This reasoning by the Indiana Supreme Court is too narrow and defined to fully set forth the efforst of such broad and unreasonable inspection provisions. Although no criminal action is authorized by the ordinance for refusal of inspection, licenses can be denied for such. Therefore, your petitioners are obligated to surrender their 4th Amendment rights if they intend to operate a legitimate business within the City. The City officials who investigate the

business, including the Indianapolis Police Department and the Marion County Sheriff's Department can make arrests based upon these unconsented to and illegal searches upon their entering the premises. This is a catch-22 situation wherein, although your petitioners cannot face criminal prosecution for refusal to permit inspection, they do face revocation of their license, Therefore, they are required to consent to the search in order to operate a legitimate business, and subject themselves and their employees to any other arrests or any other criminal minor violations because the inspections are being conducted by the various police officials.

In a very recent case, Barlow's, Inc. vs. Usury, (D.C. Idaho, 1976), 424 F. Supp. 437, the United States District Court declared that O.S.H.A. Inspection provisions which attempted to authorize warrantless inspections of business were violating the 4th Amendment and therefore unconstitutional and invalid as invasions of privacy in authorizing illegal and unreasonable searches and seizures.

Your petitioners would also direct the Court

to the opinion of the United States District Court in the case of Hogge, et al. v. Hedrick, et al., 391 F. Supp. 91 (1975), a case interpreting the constitutionality of a massage parlor ordinance very similar to the one herein, which also authorized warantless searches and inspections as stating the following proposition:

> "In sanctioning "reasonable" inroads upon the right of privacy guaranteed commercial establishments and their patrons, however, the Supreme Court in Camera did not jettison those procedural protections which the amendment erects against arbitrary and indiscriminate intrusion into protected privacy areas. Municipalities, in order to make reasonable unconsented administrative searches must comply with the "probable cause" warrent and neutral magistrate requirements of the 4th Amendment. The probable cause requirement is just one safeguard to insure that the governmental interests in arresting persons and securing evidence is not asserted lightly in the case of the constitutionally protected privacy interests.
>
> The 4th Amendment would be reduced to a form of words if the Court were to countenance this administrative search ordinance which makes no pretense of compliance with the "probable cause" warrant, and neutral magistrate requirements of the 4th Amendments."

It is petitioners' contention that these unreasonable search and inspection requirements are again based upon the conclusive presumption by the City that illegal activities take place in these legitimate businesses. Again, petitioners contend that this is in itself a violation of the due process guarantees of the 14th Amendment of the United State Constitution. There is no manifest necessity nor extringent circumstances which would require on the spot search and inspection of these legitimate businesses or their premises, without taking the time to obtain a warrant or comply with the requirements of the 4th Amendment. The Supreme Court in their opinion as quoted above, sets forth the proposition that there are no criminal penalties for refusing the search. It is petitioners' contention that this is not the test. The test here is whether there is a violation or infringement upon the petitioners' guaranteed individual rights. It must also be pointed out again, that refusal of inspection even if petitioners feel their rights are being violated, subject them to revocation of

license and the loss of a livelihood, the same being held to be a fundamental right in cases before the Court.

CONCLUSION

For the reasons stated above, your petitioners submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, and require the Court to note jurisdiction in this matter. The question raised as to equal protection and due process quarantees under the 14th Amendment, illegal and unresonable searches and seizures under the 4th Amendment, and the guaranteed rights of privacy as found under the provisions of the 1st Amendment, the 14th Amendment, and the 4th Amendment of the United States Constitution require that the Court consider this cause, with briefs on the merits and oral argument for the resolution, and that the Court consider this matter for the purposes of consolidating and defining the rights and privileges of legitimate businesses engaged in the occupation

of "massage parlors" and "masseuses" throughout the country, and to define the rights of the citizens.

Respectfully submitted,

JOHN R. CROMER, Attorney for Appellants

APPENDIX A

CITY OF INDIANAPOLIS, William Hudnut as Mayor of the City of Indianapolis, Fred Armstrong, as City Controller of the City of Indianapolis, Appellants (Defendants below)

v.

John WRIGHT d/b/a Touch of Class Massage Parlor, and Mary Kay Gilbert, Appellees (Plaintiffs below)

Mary Jo Kocher, Appellee (Intervening Plaintiff below)

CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below)

Karon GRIFFIN, et al., Appellees (Plaintiffs below)

No 477 S 272, 777 S 488

Supreme Court of Indiana

(Filed January 19, 1978)

Cause No. 477 S 272 was initiated by John Wright and Mary Kay Gilbert, appellees, when, on October 14, 1976, they filed their complaint for a temporary restraining order, permanent injunction and declaratory relief. A temporary restraining order was issued and subsequent to a hearing pursuant to Ind. R. Tr. P. 65 (A) (2), the trial court granted the permanent injunction and the declaratory relief prayed for.

The trial court's judgment determined that the massage parlor ordinance at issue here was unconstitutional. More specifically it found that state law has preempted municipal legislation regarding criminal sexual activity, making the ordinance an attempted local law prohibited by the Indiana Constitution. He also found the ordinance violative of the due process and equal protection provisions of the Indiana Constitution and of the prohibition against unreasonable searches and seizures of both the Indiana and United States Constitutions.

Cause No. 777 S 488 involves a nearly identical proceeding which resulted in an identical judgment one day later. Although separately tried and appealed, both appellants' and appellees' briefs present identical arguments to the issues involved. Appellants in Cause No. 477 S 272, the city, its mayor and its controller, sought transfer pursuant to Ind. R. Ap. P. 4 (A) (10). Transfer was granted and Cause No. 777 S 488 is consolidated therewith for the purposes of this opinion. Hereafter the appellants shall be referred to as "the city" and the

appellees shall be referred to as "the massage parlors" for the sake of convenience, unless it is otherwise indicated.

I.

The city argues that the trial court erred in its determination that the massage ordinance was an attempted local law in an area preempted by state law and therefore prohibited by the Indiana Constitution.

In City of Indianapolis v. Sablica (1976), ___ Ind. ____, 342 N.E. 2d 853, this Court invalidated a municipal ordinance which made it a misdemeanor for one to interfere with or taunt a police officer. We determined that the legislature, by creating the state criminal offense of resisting or interfering with an officer, had determined that a general law shall apply and that local legislation on the same subject was constitutionally impermissible. Both the statute and the ordinance in that case provided criminal penalties for violation of their provisions.

In the present case the City-County Council

of the City of Indianapolis and Marion County enacted an ordinance, City-County Council General Ordinance No. 110, providing for the detailed regulation of massage parlors. Among other things, this ordinance requires massage parlors and other similar establishments to be licensed by the City Controller. Massage therapists are prohibited from administering a massage to a person of the opposite sex, touching the sexual or genital area of any person or from performing, offering or agreeing to perform any act which would require the touching of the patron's genitals. Therapists are required to wear nontransparent outer garments and patrons are required to have their sexual and genital areas covered by a towel or garment at all times.

Ordinance No. 110 contains the following sections relating to enforcement:

> "Sec. 27-731. Complaints.
>
> "All complaints of alleged violations of the provisions of this chapter shall be made in writing to the Controller. Upon learning of violation of the provisions of this chapter and/or related ordinances or laws,

> the Controller shall utilize the enforcement remedies provided in Section 17-49."

The enforcement remedies contained in the section referred to authorize the controller to suspend or revoke the license of the licensee. Sec. 17-49 does not provide criminal misdemeanor penalties for violation of the duties contained in the ordinance.

The massage parlors argue that the general penalty provision of the City-County Ordinances provide misdemeanor penalties for violation of the massage ordinance.

> "Sec. 1-8. General penalties for violations of Code.
>
> "(a) Whenever in any chapter, article, division or section of this Code, or of any ordinances amendatory thereof or supplemental thereto, the doing of any act, or the omission to do any act or to perform any duty, is declared to be a violation of this Code, or of any such amendatory or supplemental ordinance, or of any provision thereof, or is declared to be unlawful, and if there shall be no fine or penalty otherwise specifically prescribed or declared for any such violation, or for doing or for omitting to do any such act or to perform any such duty, any person who shall be convicted of any such violation, or

> of doing or of omitting to do any such act or to perform any such duty shall be fined, by way of a penalty therefor, not more than one thousand dollars ($1,000.00) for each such violation, act or omission, to which may be added imprisonment not exceeding one hundred and eighty (180) days." (Emphasis supplied)

The trial court accepted the massage parlors' argument and invalidated the ordinance. However, the general penalty provision applies only if no penalty is specifically provided for by the ordinance defining the duty. The massage ordinance provides a specific penalty in the previously quoted section by mandating the controller to use the enforcement provision of Sec. 17-49. This is the exclusive enforcement remedy, as is indicated by the use of the word "shall". The fact that Sec. 17-49 gives the controller discretion in determining whether or not to suspend or revoke a license does not indicate that the council intended otherwise.

In support of the trial court's decision that the ordinance is an invalid local law, the massage parlors cite the following state statutes, contending that these statutes preempt similar local laws: Ind.

Code § 35-1-89-1 (Burns 1975) (sodomy, now repealed); Ind. Code § 35-45-4-1 (Burns Supp. 1977) (new penal code provision regarding public indecency); Ind. Code § 35-1-83-3 (Burns 1975) (public indecency, now repealed); Ind. Code § 35-45-4-2 (Burns Supp. 1977) (new penal code provision on prostitution); Ind. Code § 35-30-10.1-3 (Burns Supp. 1977) (obscene performance). The massage parlors contend that the City-County Ordinance prohibits the same acts as are prohibited by the above state statutes and that the ordinance is therefore invalid. We have, however, already determined that the ordinance does not provide for misdemeanor penalties and there is no state statute which establishes a licensing system for massage parlors. Lancaster v. Municipal Court (1972) 100 Cal. Rptr. 609, 494 P. 2d 681, is distinguishable in that the ordinance involved in that case provided for misdemeanor penalties. Under the facts of this case we do not believe that the present massage parlor

ordinance involves the same "subject matter" as the state statutes. City of Indianapolis v. Sablica (1976), ___ Ind. ____, 342 N.E. 2d 853, 855. The ordinance establishes a licensing plan whereas the statutes establish a penal scheme. The ordinance is therefore not unconstitutional under Ind. Const. Art. 4 § § 22 and 23 as being an attempted local law where the legislature has determined that a general law shall apply.

II.

The trial court determined in each of these cases that the massage parlor ordinance was contrary to the due course of law and equal protection provisions of the Indiana Constitution. No finding was made with respect to the similar federal constitutional provisions. The city argues that the trial court was erroneous in its determination. The massage parlors, in support of the trial court, argue that the ordinance violates due course of law in that it deprives massage therapists of their fundamental right to earn a livelihood, that it unconstitutionally

discriminates on the basis of sex, and that it creates an unconstitutional irrebuttable presumption that opposite sex massages lead to illicit sexual relations.

This Court's interpretation of a state constitutional provision is an independent judicial act. Federal cases are nonetheless presuasive, Reilly v. Robertson (1977), ____ Ind. ____, 360 N.E. 2d 171, as are the decisions of the courts of last resort of other state jurisdictions. Allen v. Van Buren Twshp. (1962) 243 Ind. 665, 184 N.E. 2d 25.

> "It is the province of the state courts to interpret and apply the provisions of their state constitutions, but where a provision of a state constitution is similar in meaning and application to a provision of the federal constitution, it is desirable that there should be no conflict between the decisions of the state courts and the federal courts on the subject involved. While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the Fourteenth Amendment is not absolutely binding on the courts of the state when the statute is attached as being in conflict with a provision of the state constitution having the same effect, still, the federal decision in such cases is strongly persuasive as

> authority, and is generally acquiesced in by the state courts."

Sperry & Hutchinson Co. v. State (1919) 188 Ind. 173 at 180, 122 N.E. 584 at 587.

Numerous state and federal courts have considered the constitutionality of similar ordinances. Even before certain recent developments, the prevailing view upheld their constitutionality. See, Annot. 51 ALR 3d 929 (1973). Recently, appeals from three state court decisions upholding the constitutionality of massage parlor ordinances have been dismissed by the United States Supreme Court for want of a substantial federal question. Smith v. Keator (1974) 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 dismissing 285 N.C. 530, 206 S.E. 2d 203; Rubenstein v. Township of Cherry Hill, (1974) 417 U.S. 963, 94 S. Ct. 3165, 41 L. Ed. 2d 1136, dismissing No. 10,027 (N.J. Sup. Ct.) (unreported); Kisley v. City of Falls Church, (1972) 409 U.S. 907, 93 S. Ct. 237, 34 L. Ed 2d. 169 dismissing 212 Va. 693, 187 S.E. 2d 168. By virtue of the Supreme Court's decision in Hicks v. Miranda (1975) 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223, those dismissals are to be treated as dispositions

on the merits of the issues raised. Lower federal courts are bound by the decisions of these summary dispositions. Lower federal courts which have since considered similar massage parlor ordinances have affirmed their constitutionality based upon these summary dispositions. Colorado Springs Amusements v. Rizzo (3d Cir. 1975) 524 F. 2d 571, cert. den. 428 U.S. 913, 96 S. Ct. 3228, 49 L. Ed. 2d 1222 (Brennan, J., dissenting with opinion); Hogge v. Johnson, (4th Cir. 1975) 526 F. 2d 833; cert. den. 428 U.S. 913, 96 S. Ct. 3228, 49 L. Ed. 2d 1221 (Brennan J., dissenting); Cullinane v. Geisha House (D.C. Ct. App. 1976) 354 A. 2d 515, cert. den. 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (Brennan, J., dissenting); Tomlinson v. Mayor and Aldermen, (5th Cir. 1976) 543 F. 2d 570.[1/] It is therefore settled that the due process and equal protection provisions of the federal constitutions are not violated by massage parlor ordinances as involved here.

1. Those federal cases which have found such ordinances unconstitutional were previous to the cited summary dispositions and are apparently overruled. Cianciolo v. Members of the City Council (E.D. Tenn. 1974) 376 Fed. Supp. 719; Joseph v. House (E.D. Va. 1973) 353 Fed. Supp. 367.

Jurisdictions other than those previously cited have also sustained similar ordinances against constitutional attack. Thompson v. City of Huntsville (Ct. Crim. App. Ala. 1976) 329 So. 2d 664, cert. den. 329 So. 2d 666; Oueilhe v. Loveall (1977) ___ Nev. ____, 560 P. 2d 1348; Exparte Maki, (1943) 56 Cal. App. 2d 635, 133 P. 2d 64 to the extent it is not overruled by Lancaster v. Municipal Court (1972) 100 Cal.Rptr. 609, 494 P. 2d 681 (invalidating an ordinance on state preemption grounds). 2/

Having reviewed these decisions and their rationale, it is unnecessary to pursue the parties' various constitutional arguments for we are in agreement with the propositions and results of the overwhelming weight of authority which finds massage parlor ordinances prohibiting opposite sex massages to be unconstitutional.

III.

The trial court found that the inspection provisions of the ordinance violated the prohibition

2. Apparently J.S.K. Enterprises, Inc. v. Lacey (1971) 6 Wash. App. 43, 492 P. 2d 600 is the only authority that would hold to the contrary.

of the United States and Indiana Constitutions against unreasonable searches and seizures. The relevant section of the ordinance is as follows:

> "Every massage school, massage parlor, massage therapy clinic, or bath house shall be open for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors and duly authorized representatives of the City Controller upon the showing of proper credentials by such persons."

Sec. 17-729 (j)

The city contends that the trial court erred in this determination. The massage parlors rely principally on the companion cases Camera v. Municipal Court (1967), 387 U.S. 523, 87 S. Ct. 1727,18 L. Ed. 2d 930; See v. City of Seattle (1967) 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943. In Camera the Fourth Amendment was held to prohibit prosecution for the refusal to permit building inspectors to inspect a personal residence without a warrant. In See the Fourth Amendment was held to prohibit prosecution for refusing to permit fire department inspectors to inspect a locked warehouse without a warrant. These opinions "reserved

decision on problems of 'licensing programs' requiring inspection, saying they can be resolved 'on a case by case basis under the general Fourth Amendment standard of reasonableness.'" Colonade Catering Corp. v. U.S., (1970) 397 U.S. 72 at 77, 90 S. Ct. 774 at ___, 25 L. Ed. 2d 60 at 64.

The limitations on administrative searches supporting a licensing program have not yet been made clear. See, Brennan v. Gibson's Products Inc. (E.D. Tex. 1976) 407 Fed. Supp. 154. Certain factors to be used in determining whether a search is reasonable can be ferreted out, such as whether the statute provides criminal penalties for the refusal to permit inspections, whether notice is given of an impending inspection, Wyman v. James (1971) 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408,whether notice is unreasonable given the ease with which violations can be concealed in a short period of time, U.S. v. Biswell (1972) 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87, whether the inspection is of a residence or a business and whether the business involved has a history of regulation, supervision and inspection, Biswell, supra; Colonade Catering Corp., supra. In declaring

unconstitutional a border patrol search of an automobile, the Court distinguished Colonade and Biswell by saying:

> "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . ."

Almeida-Sanchez v. U.S., (1973) 413 U.S. 266 at 271, 93 S. Ct. 2535 at _____, 37 L. Ed. 2d 596 at 601.

The inspection system authorized here does not fit neatly into the factual framework of any of the cited cases. A consideration of the above mentioned factors reveal the following. No criminal prosecutions are authorized for the refusal to permit inspections, only the license is affected. Notice would seem to be unreasonable given the ease with which some violations could be concealed. It is a business which is being inspected and one which has a history of regulation, Annot. 17 ALR 2d 1183 (1951), albeit not as extensive as the liquor or firearms industries, and as a member of a

regulated business, a licensee does impliedly consent to inspections at any and all reasonable times and places by obtaining a license, Biswell, supra. It should also be noted that inspections are limited by the ordinance to business hours and other reasonable times. We cannot presume that the city officials will conduct inspections in a manner other than constitutional, although this certainly is possible under this or any other grant of authority. Weighing the various factors the administrative inspection scheme authorized here is not unreasonable nor in contravent of the prohibitions of the Indiana or United States Constitutions.

In view of our decision we need not reach the city's other specification of error.

The decisions of the trial court are erroneous and the judgments should be reversed.

Judgments reversed.

GIVAN, C. J., DeBRULER and PINARNIK, JJ., concur.

PRENTICE, J., not participating.

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
CAUSE NO. S776-1229 ROOM #7

KARON GRIFFIN, et al.,
Plaintiffs

vs.

CONSOLIDATED CITY OF INDIANAPOLIS,
Defendants

JUDGMENT ENTRY

The Court, having heard the evidence in this cause, and having further heard arguments of counsel, and having taken this matter under advisement, now finds and rules as follows:

1. That the factual allegations contained in the Verified Complaint of the plaintiffs are true.

2. That Section 17-729 (e) (f) (h) and (i) of the City-County General Ordinance No. 110 of the City of Indianapolis is unconstitutional, void, and of no further force or effect, in that:

(a) Section 17-729 (e) of the Ordinance prohibits the administration of any massage, alcohol rub, or similar treatment, formentation, bath or electric or magnetic treatment, by an individual of one sex to an individual of the opposite sex.

(b) Section 17-729 (f) of the Ordinance states that all employees of massage parlors shall wear clean non-transparent outer garments, covering the sexual and genital areas.

(c) Section 17-729 (h) of the Ordinance prohibits any person licensed under this Ordinance from placing their hand upon, touching or fondling a sexual or genital area of any other person or of himself.

(d) Section 17-729 (i) states that no employee of a massage parlor shall perform, offer or agree to perform any acts which shall require the touching of the patron's genitals.

(e) The licensing code of the City of Indianapolis, of which Section 17-729 (e), (f), (h) and (i) are a part, is enforceable through Section 1-8 of the Code of Indianapolis, which

provides for fines of up to One Thousand Dollars ($1,000.00) and/or imprisonment not exceeding one hundred eighty (180) days, for the violation of any of the provisions of the Code of the City of Indianapolis.

(f) The only reason advanced by the City of Indianapolis, in its tendered evidence and its argument to this Court, for the recent adoption of Section 17-729 (e), (f), (h), and (i) is that it is an attempt by the City to prevent illicit sexual conduct between individuals of the opposite sex.

(g) Section 17-729 (e), (f), (h), and (i) of said Ordinance is a legislative attempt, on the part of the City of Indianapolis, to regulate sexual conduct among individuals in the City of Indianapolis, and enforce such regulation by means of criminal penalties.

(h) The State of Indiana has previously passed legislation, regulating the criminal aspects of sexual activity between members

of the opposite sex in the State of Indiana, and such legislation is binding upon all persons located within the territorial and jurisdictional boundaries of the State of Indiana, including all individuals located within the territorial and jurisdictional boundaries of the City of Indianapolis.

(i) The State of Indiana has preempted the criminal aspects of sexual activity among members of the opposite sex in the State of Indiana.

(j) Section 17-729 (e), (f), (h), and (i) of said Ordinance is invalid as an attempted local law prohibited by Article 4, Sections 22 and 23 of the Indiana Constitution.

3. That Section 17-729 (e) of the said Ordinance is further unconstitutional, invalid, void and of no further force and effect, in that it is violative of the due process and equal protection provisions of the Indiana State Constitution.

4. That Section 17-729 (j) and Section 17-727 (a) (9) of said Ordinance provides for unlimited, warrantless searches of the plaintiffs'

premises, by police officer, health inspectors, fire inspectors, and "duly authorized representatices" of the City Controller, all in violation of the rights of the plaintiffs to be secure against unreasonable searches and seizures, guaranteed by Article I, Section II of the Constitution of Indiana, and the Fourth Amendment to the United States Constitution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a permanent injunction now issue, versus the defendants, enjoining them from enforcing the provisions of Section 17-729 (e), (f), (h), (i) and (j) of Section 17-727 (a) (9) of City County General Ordinance No. 110 of the Code of the City of Indianapolis.

(Gerald S. Zore)
GERALD S. ZORE, JUDGE MARION COUNTY SUPERIOR COURT ROOM No. 7

DATED: (October 26, 1976)

APPENDIX C

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION COUNTY SUPERIOR COURT
CAUSE NO. S776-1226 ROOM #7

JOHN WRIGHT d/b/a
TOUCH OF CLASS MASSAGE PARLOR
and MARY KAY GILBERT,

Plaintiffs

-vs-

CITY OF INDIANAPOLIS:
WILLIAM HUDNUT, As Mayor
of the City of Indianapolis;
FRED ARMSTRONG, As City Controller
of the City of Indianapolis,

Defendants

JUDGMENT ENTRY

The Court, having heard the evidence in this cause, and having further heard arguments of counsel, and having taken this matter under advisement, now finds and rules as follows:

1. That the factual allegations contained in the Verified Complaint of the plaintiffs are true.

2. That Section 17-729 (e) of City County General Ordinance No. 110 of the City of Indianapolis is unconstitutional, void, and of no further force or effect, in that:

(a) Section 17-729 (e)of the Ordinance prohibits the administration of any massage, alcohol rub, or similar treatment, fomentation, bath or electric or magnetic treatment, by an individual of one sex to an individual of the opposite sex.

(b) The licensing code of the City of Indianapolis of which Section 17-729 (e) is a part, is enforceable through Section 1-8 of the Code of Indianapolis, which provides for fines of up to One Thousand Dollars ($1,000.00) and/or imprisonment not exceeding one hundred eighty days (180) for the violation of any of the provisions of the Code of the City of Indianapolis.

(c) The only reason advanced by the City of Indianapolis, in its tendered evidence and its argument to this Court, for the recent adoption of Section 17-729 (e), is that it is an attempt by the City to prevent illicit sexual conduct between individuals of the opposite sex.

(d) Section 17-729 (e) of said Ordinance is a legislative attempt, on the part of the City of Indianapolis, to regulate sexual conduct among

individuals in the City of Indianapolis, and enforce such regulation by means of criminal penalties.

(e) The State of Indiana has previously passed legislation, regulating the criminal aspects of sexual activity between members of the opposite sex in the State of Indiana, and such legislation is binding upon all persons located within the territorial and jurisdictional boundaries of the State of Indiana, including all individuals located within the territorial and jurisdictional boundaries of the City of Indianapolis.

(f) The State of Indiana has preempted the criminal aspects of sexual activity among members of the opposite sex in the State of Indiana.

(g) Section 17-720 (e) of said Ordinance is invalid as an attempted local law prohibited by Article 4, Sections 22 and 23 of the Indiana Constitution.

3. That Section 17-729 (e) of said Ordinance is further unconstitutional, invalid, void and of no further force or effect, in that it is violative of the due process and equal protection provisions of the Indiana State Constitution.

4. That Section 17-729 (j) and Section 17-727 (a) (9) of said Ordinance provide for unlimited, warrantless searches of the plaintiffs' premises, by police officers, health inspectors, fire inspectors, and "duly authorized representatives" of the City Controller, all in violation of the rights of the plaintiffs to be secure against unreasonable searches and seizures, guaranteed by Article I, Section II of the Constitution of Indiana, and the Fourth Amendment to the United States Constitution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a permanent injunction now issue, versus the defendants, enjoining them from enforcing the provisions of Section 17-729 (e), Section

17-729 (j) and Section 17-727 (a) of City County General Ordinance No. 110 of the Code of the City of Indianapolis.

DATED: (October 25, 1976)

(Gerald S. Zore)
GERALD S. ZORE, JUDGE
MARION COUNTY SUPERIOR COURT #7

APPENDIX D

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

I Beverly S. Rippy, Clerk of the City-County Council, Indianapolis, Marion County, Indiana, do hereby certify that the attached is a true, full, and complete copy of Section 17-49 and Sections 17-725 through 17-731 of The Code of Indianapolis and Marion County Indiana.

Beverly S. Rippy
Clerk of the City-County Council

WITNESS MY HAND THIS 2 DAY OF June, 1978.

SEAL:

Sec. 17-49. Enforcement of orders affecting licensees; revocation and suspension of licenses.

(a) Upon learning of a violation of law by a licensee, the controller shall issue a provisional order to the licensee setting forth such violation. The provisional order shall be delivered to the licensee pursuant to the notice provisions of this Code and shall inform the licensee of all of his rights under this Code.

(b) If any licensee, by the conduct of his business or premises, creates a situation or nuisance inimical to the public welfare, or is charged in any court with an offense involving his fitness to hold a license and an emergency exists, the license of the licensee may be temporarily suspended by the controller without a hearing. The order temporarily suspending the license shall be delivered to the licensee pursuant to the notice provisions of this Code and shall inform the licensee of all of his rights under this Code.

(c) The controller shall cause personal service of all notices and orders to be made on the person concerned, either by personal delivery or by registered mail, with return receipt requested. In the absence or disability of a licensee, a copy of the notice shall be affixed to some structure on the premises where it may be readily found or observed by the licensee, or it may be delivered to any agent or employee of the licensee upon the premises or to any adult occupant thereof, and he shall be bound thereby. Depositing any such notice in the United States mail shall constitute service thereof.

(d) Each licensee who is subject to a provisional order or temporary suspension under subsection (b) of this section shall have ten (10) days in which to remedy the reasons causing the provisional order or temporary suspension to be issued. Ten (10) days after notice has been given of a temporary suspension or provisional order, another inspection shall be conducted and the results reported to the controller, who shall either reinstate the license in the case of a temporary suspension, or rescind or modify the provisional order, or revoke the license.

(e) Upon written application of the licensee during the ten-day period, or upon the controller's own motion, a hearing shall be conducted by the controller, during which evidence shall be presented under oath by both the licensee and those inspectors or others knowing the reasons why the license should be revoked. Upon the completion of the hearing, the controller shall reinstate the license, modify the provisional order or reasons for temporary suspension, or revoke the license.

(f) At any time during the ten-day period, the licensee may request in writing a reasonable extension of the time to remedy the reasons for which the provisional order or temporary suspension was issued. The controller may grant or deny the request in his discretion, or he may order a continuance or extension of time on his own motion.

(g) In all cases where the license is revoked or suspended for a period not to exceed ninety (90) days, the decision of the controller shall be reported in writing to the licensee affected and a certified copy of the decision shall be filed in the controller's office within twenty-four (24) hours from the time of the decision. The decision shall become effective upon issuance by the controller.

(h) Once a license has been revoked, it shall not be renewed or reissued, and a new license shall not be issued for any business to be conducted by or for the same licensee on any premises within six (6) months after the revocation if the same licensee is shown to have any financial interest therein or to have any direct or indirect control of the business.

(i) When a license has been revoked or suspended, no refund of any portion of the license fee shall be made to the licensee. (Code 1970, § 7-109; G.O. 80, 1970)

Sec. 17-50. Possession of suspended or revoked certificates or insignia.

Once a license has expired or has been revoked or suspended, all certificates and insignia shall be immediately surrendered to the controller. No person shall have in his

Sec. 17-709. License period.

The term of a license issued pursuant to this division shall be one (1) year. (Code 1970, §§ 7-1704, 7-1710; G.O. 80, 1970)

Secs. 17-710—17-724. Reserved.

ARTICLE XXI. BATHHOUSES, MASSAGE PARLORS AND RELATED ENTERPRISES*

Sec. 17-725. Definitions.

Whenever used in this article, the following words or phrases shall be defined as herein stated:

(a) *Bathhouse* means any building, room, place or establishment, other than a regularly licensed hospital, dispensary, hotel, rooming house or public lodging house, where members of the public are provided with baths, regardless of whether steam, vapor, water, sauna or otherwise.

(b) *Massage parlor* means any building, room, place or establishment, other than a regularly licensed hospital or dispensary where nonmedical and nonsurgical manipulative exercises are practiced upon the human body with or without the use of mechanical or bath devices, by anyone not a physician, osteopath, chiropractor, podiatrist or physical therapist duly registered with and licensed by the State of Indiana.

(c) *Massage* means any method of treating the superficial soft parts of the body for remedial or hygienic purposes, consisting of rubbing, stroking, kneading or tapping with the hands or instruments.

(d) *Massage school* means any bathhouse or massage parlor, defined in subsections (a) and (b) above, where

*Editor's note—General Ordinance No. 23 of 1974 amended Chapter 19 of Title 7 of the city-county's 1970 Code, which had been included in this Code as Art. XXI, §§ 17-725—17-728 and 17-739—17-746, to read as set out in Art. XXI, §§ 17-725—17-731. The superseded sections were derived from G.O. 80, 1970, as well as from Code 1970, §§ 17-1901—17-1906.

the act of massage as defined in subsection (c) above is either taught or practiced.

(e) *Massage therapy* means the act of body massage, either by mechanical or electrical apparatus, for the purpose of reducing or contouring the body by the use of oil rub, salt, hot and cold packs, cold showers and cabinet baths.

(f) *Massage therapist* means any person who practices, administers or teaches all or any of the subjects or methods of treatment defined in subsection (e) above as massage therapy.

(g) *Massage therapy clinic* means any shop, establishment or place of business where any or all of the methods of massage therapy are administered or used.

(h) *Massage therapy school* means any duly registered massage therapy establishment where a tuition is charged for the instruction of massage therapy techniques.

(i) *Private health club* means a facility for exercise and physical training which is operated for, and open only to, members of a private club and their invited guests.

(j) *Private club* means an organization or association maintaining clubrooms or other recreation or social facilities used primarily for purposes other than a bathhouse or massage parlor, membership in which is limited to persons paying regular dues or assessments.

(k) *Sexual and genital area* means the sexual or genital area of any person and shall include the genitals, pubic area, anus or perineum of any person, or the vulva or breast of a female. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-726. License required.

(a) It is unlawful for any person or firm to operate, conduct or maintain a massage school, massage parlor,

massage therapy clinic or bathhouse without a license to operate such massage school, massage parlor, massage therapy clinic or bathhouse issued by the city controller.

(b) It shall be unlawful for any person or firm licensed to operate a massage school, massage parlor, massage therapy clinic or bathhouse to employ or permit any person to perform a massage unless such person is licensed as a massage therapist by the city controller.

(c) It shall be unlawful for any person to be employed as a massage therapist or to perform massages for a fee unless such person is licensed as a massage therapist by the city controller. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-727. Applications for licenses.

(a) The application for a license to operate a massage school, massage parlor, massage therapy clinic or bathhouse shall contain the following information and should be individually signed by the applicant:

(1) Name of applicant and aliases;

(2) Resident address of applicant and former addresses for the past three (3) years;

(3) Business address of applicant;

(4) Number of massage tables, shower stalls or other such individual units;

(5) The age, date of birth and citizenship of the applicant, in the case of individuals, and of the manager and officers in the case of a corporation;

(6) The names, addresses, ages, citizenship and designations of each person connected with the applicant's establishment;

(7) Whether the applicant or its manager or officers have ever been previously engaged in operating a massage school, massage parlor, massage therapy clinic or bathhouse;

(8) Whether any applicant, or in the case of a corporation, its managers, officers, directors or stockholders, have ever been convicted of any act of violence, moral turpitude, sex offense or prior violation of this article;

(9) An agreement by the operator permitting inspection;

(10) Type of license being applied for by the applicant.

(b) Along with the operator's application for a license, there shall be filed a verified application for a massage therapist license by each individual who is employed in the establishment who is required by this article to be licensed. The application should contain the following information:

(1) Name and aliases;

(2) Age, date of birth;

(3) Address and former addresses for past three (3) years;

(4) Citizenship;

(5) Whether convicted of any public offense concerning an act of violence, moral turpitude, sex offense or prior violation of this article;

(6) Nature of work performed.

(c) Along with the aforesaid applications for licenses there shall be a certificate from a duly licensed medical practitioner, on a form prescribed by the Health and Hospital Corporation of Marion County, certifying that said applicant is free from communicable diseases and that said examination has been made within thirty (30) days prior to the application for the license or permit herein sought. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-728. License fees.

The annual license fee for each person who operates or is employed by a massage parlor, massage therapy clinic or bathhouse, or any combination thereof, shall be determined in accordance with the following scale:

(a) Class A licenses shall be required for all private health clubs; the fee for said license to be fifty dollars ($50.00) annually.

(b) Class B licenses shall be required for all other owners of the above-mentioned businesses; the fee for said license to be two hundred fifty dollars ($250.00) annually.

(c) Class C licenses shall be required for massage therapists; the fee for said license to be twenty-five dollars ($25.00) annually for each therapist. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-729. Operation.

(a) No massage school, massage parlor, massage therapy clinic or bathhouse shall be operated or conducted in, or with a separate opening to, living quarters. There must be a separate opening to living quarters and a separate entrance to the place of business. No one should use the building quarters for a place of habitation.

(b) All licensed operators or permit holders under this article shall show their licenses or permits in a visible location in their establishment.

(c) All licenses or permit holders shall be subject to all other city ordinances, county ordinances and State of Indiana statutes and to regulations of various administrative bodies of the city, county and state. Violation of such regulations, ordinances or statutes shall be grounds for revocation of licenses or permits.

(d) No person shall be employed by any licensee under this article or be within view of any of the services rendered by a massage parlor, massage therapy clinic or bathhouse who has not reached the age of twenty-one (21).

(e) No person holding a license under this article shall administer to a person of the opposite sex, any massage, alcohol rub or similar treatment, fomentation, bath or electric or magnetic treatment, except upon the signed order of a licensed physician, osteopath, chiropractor, podiatrist or registered physical therapist. A person shall neither cause nor permit in or about his place of business, or in connection with his business, any agent, employee, servant or other

individual to administer any such treatment to any individual of the opposite sex.

(f) All employees of establishments licensed under this article, including masseurs, masseuses and therapists, shall wear clean, nontransparent outer garments covering the sexual and genital areas.

(g) The sexual or genital areas of patrons of establishments required to be licensed under this article must be covered with towels, clothes or undergarments when in the presence of an employee, masseur, masseuse or therapist.

(h) No person in any establishment licensed under this article shall place his or her hand upon or touch with any part of his body or fondle in any manner or massage a sexual or genital area of any other person.

(i) No employee of an establishment licensed under this article shall perform, offer or agree to perform, any act which shall require the touching of the patron's genitals.

(j) Every massage school, massage parlor, massage therapy clinic or bathhouse shall be open for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors, and duly authorized representatives of the city controller upon the showing of proper credentials by such persons.

(k) Any bathhouse, massage parlor, massage therapy clinic, massage therapy school, or any combination thereof, is prohibited from installing or maintaining any lock or similar device on the inside of any door of said business which cannot be operated by key or knob from the exterior of said door.

(l) Any establishment licensed under this article as a private health club shall maintain a current list of members, as the case may be, and a roster of those receiving massage therapy by dates which lists and rosters shall be available to anyone inspecting the establishment pursuant to subsection (j). (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-730. Issuance or rejection of application; qualifications.

(a) The controller, before issuing any license provided for herein, shall investigate the character of the applicant, and the officers, directors and managers of the business if it is a corporation. No license shall be issued if he shall find:

(1) That any of the persons named in the application or any employee thereof are not persons of good moral character;

(2) That any of said persons have previously been connected with any massage school, massage parlor, massage therapy clinic or bathhouse where the license therefor has heretofore been revoked, or where any of the provisions of the law applicable to massage schools, massage parlors, massage therapy clinics or bathhouses have been violated;

(3) That the premises sought to be so licensed fail to comply in any manner with the ordinances and laws applicable thereto.

(b) All applicants for licenses to engage in the practice of massage therapy must submit a certificate of affidavit of their respective qualifications as to schooling, training and experience, and where and how obtained. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Sec. 17-731. Complaints.

All complaints of alleged violations of the provisions of this article shall be made in writing to the controller. Upon learning of violations of the provisions of this article and/or related ordinances or laws, the controller shall utilize the enforcement remedies provided in section 17-49. After a hearing thereon, if the controller should determine that said license shall be revoked, no refund of license or permit fee shall be due. (G.O. 23, 1974, § 1; G.O. 110, 1976, § 1)

Secs. 17-732—17-761. Reserved.

APPENDIX E

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEES
DAVID R. FRICK Corporation Counsel STEPHEN GOLDSMITH Chief Trial Deputy City County Legal Division 2560 City County Building Indianapolis, Indiana 46204	JOHN R. CROMER 431 East Hanna Avenue Indianapolis, Indiana 46227

IN THE
SUPREME COURT OF INDIANA

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis, Appellants (Defendants below) -vs- JOHN WRIGHT d/b/a TOUCH OF CLASS MASSAGE PARLOR; and MARY KAY GILBERT, Appellees (Plaintiffs below) -vs- MARY JO KOCHER, Appellee (Intervening Plaintiff below) -vs- CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below) -vs- KARON GRIFFIN, et al., Appellees (Plaintiffs below)	) (Filed Feb. 3,1978)) No. 477 S 272) No. 777 S 488	

APPEALS FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Gerald S. Zore, Judge

NOTICE OF APPEAL

TO: SUPREME COURT OF THE STATE OF INDIANA
Indiana State Capital
State House
Indianapolis, Indiana

CLERK OF THE INDIANA SUPREME COURT
State House
Indianapolis, Indiana

CITY COUNTY LEGAL DIVISION
DAVID R. FRICK
Corporation Counsel
STEPHEN GOLDSMITH
Chief Trial Deputy
2560 City County Building
Indianapolis, Indiana 46204

Comes now the appellees in the above entitled cause of action, by counsel, and respectfully notifies the Court and the above named persons of their intent to appeal the decision of the Indiana Supreme Court to the Supreme Court of the United States. Notice is hereby given by John R. Cromer, appellees' attorney of record, whose address is 431 East Hanna Avenue, Indianapolis, Indiana, and appeal is to be perfected to the United States Supreme Court.

WHEREFORE, Notice is hereby given that the appellees in the above entitled cause, hereby appeal the judgment

of the Indiana Supreme Court.

(John R. Cromer)
JOHN R. CROMER, Attorney for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, certified mail, to the City County Legal Division, David R. Frick, Corporation Counsel, Stephen Goldsmith, Chief Trial Deputy, 2560 City County Building, Indianapolis, Indiana, 46204, this (3) day of February, 1978.

(John R. Cromer)
JOHN R. CROMER, Attorney for Appellees

JOHN R. CROMER
431 East Hanna Avenue
Indianapolis, Indiana 46227
786-0487

(Filed February 3, 1978)

APPENDIX F

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEE
DAVID R. FRICK	JOHN R. CROMER
Corporation Counsel	431 East Hanna Avenue
STEPHEN GOLDSMITH	Indianapolis, Indiana
Chief Trial Deputy	46227
City County Legal Division	
2560 City County Building	
Indianapolis, Indiana 46204	

IN THE
SUPREME COURT OF INDIANA

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis, Appellants (Defendants below)	)	(Filed Feb. 8, 1978)
-vs-	)	
JOHN WRIGHT d/b/a TOUCH OF CLASS MASSAGE PARLOR; and MARY KAY GILBERT, Appellees (Plaintiffs below)	)	No. 477 S 272
-vs-	)	
MARY JO KOCHER, Appellee (Intervening Plaintiff below)	)	
-vs-	)	
CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below)	)	No. 777 S 488
-vs-	)	
KARON GRIFFIN, et al., Appellees (Plaintiffs below)	)	

APPEALS FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Gerald S. Zore, Judge

PETITION FOR REHEARING

Come now the appellees, by counsel, and pursuant to the provisions of Appellate Rule 11, of the Indiana Rules of Appellate Procedure, Karon Griffin, et al, and John Wright d/b/a Touch of Class Massage Parlor, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above entitled cause. In support of this Petition, appellees represent to the Court as follows:

1. That the Court failed to consider the substantial federal questions involved in the above entitled cause concerning search and seizure, due process, equal protection and sex discrimination.

2. That the irreparable harm caused to the plaintiffs should enforcement of this ordinance be commenced is great and substantial while the relative harm to appellants will be minimal.

3. That the hearing of important cases concerning constitutional questions, and the rehearing of the same, is not without precedent in the above entitled Court.

4. That this appeal involves fundamental constitutional issues of great importance that effect the operation of all plaintiffs herein, and massage parlors within the State of Indiana, and masseuses therein, and the decision of the above entitled Court on this appeal will have a vital effect on such legitimate businesses throughout the State. It is therefore appropriate that the entire Court consider all of the issues involved in this appeal, and reconsider the same.

WHEREFORE, appellees pray that a rehearing be granted and that on rehearing this Court's opinion dated January 19, 1978, be withdrawn and the Court enter a new opinion affirming the judgment of the Trial Court below.

Dated this 8th day of February, 1978.

(John R. Cromer)
JOHN R. CROMER, Attorney for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed to the City Legal Division, City County Bldg.,

Indianapolis, Indiana, this 8th day of

February, 1978, by certified mail.

(John R. Cromer)
JOHN R. CROMER

(Filed February 8, 1978)

JOHN R. CROMER
431 East Hanna Avenue
Indianapolis, Indiana 46227
786-0487

APPENDIX G
(ORDER) Appellees' Motion for Remand denied
without opinion this 6th day of March, 1978

(Richard M. Givan)
Chief Justice

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEES
DAVID R. FRICK	JOHN R. CROMER
Corporation Counsel	431 East Hanna Avenue
STEPHEN GOLDSMITH	Indianapolis, Indiana
Chief Trial Deputy	46227
City County Legal Division	
2560 City County Building	
Indianapolis, Indiana 46204	

IN THE
SUPREME COURT OF INDIANA

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis, Appellants (Defendants below)	)	(Filed Feb. 8, 1978)
-vs-	)	
JOHN WRIGHT d/b/a TOUCH OF CLASS MASSAGE PARLOR: and MARY KAY GILBERT, Appellees (Plaintiffs below)	)	No. 477 S 272
-vs-	)	
MARY JO KOCHER, Appellee (Intervening Plaintiff below)	)	
-vs-	)	
CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below)	)	No. 777 S 488
-vs-	)	
KARON GRIFFIN, et al., Appellees (Plaintiffs below)	)	

APPEALS FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Gerald S. Zore, Judge

MOTION FOR REMAND

Comes now the appellees, in the above entitled cause, by counsel, and respectfully petitions the Court for a remand of this cause to a trial court for the following reasons:

1. That substantial federal questions have been raised in this appeal, and were argued at the trial court, said questions not being answered by the trial court nor acted upon or answered by the Supreme Court of Indiana.

2. That in order to completely resolve this issue, resolve the issue of federal constitutional questions affecting the appellees herein, a decision will have to be rendered on those questions by the trial court in this cause.

WHEREFORE, appellees pray that the Court grant their petition for remand, remand this cause to the trial court for proper consideration of the federal constitutional issues, and for all other relief just and proper in the premises.

(John R. Cromer)
JOHN R. CROMER, Attorney for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed to the City County Legal Division, David R. Frick, Corporation Counsel, Stephen Goldsmith, Chief Trial Deputy, 2560 City County Building, Indianapolis, Indiana, 46204, this (8) day of February, 1978.

(John R. Cromer)
JOHN R. CROMER

JOHN R. CROMER
431 East Hanna Avenue
Indianapolis, Indiana 46227
786-0487

(Filed February 8, 1978)

APPENDIX H

(ORDER) Appellees' Petition for Stay Pending Appeal denied without opinion, this 6th day of March, 1978.

(Richard M. Givan)
CHIEF JUSTICE

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEES
DAVID R. FRICK Corporation Counsel STEPHEN GOLDSMITH Chief Trial Deputy City County Legal Division 2560 City County Building Indianapolis, Indiana	JOHN R. CROMER 431 East Hanna Avenue Indianapolis, Indiana 46227

IN THE
SUPREME COURT OF INDIANA

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis, Appellants (Defendants below) -vs- JOHN WRIGHT d/b/a TOUCH OF CLASS MASSAGE PARLOR; and MARY KAY GILBERT, Appellees (Plaintiffs below) -vs- MARY JO KOCHER, Appellee (Intervening Plaintiff below) -vs- CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below) -vs- KARON GRIFFIN, et al., Appellees (Plaintiffs below)	))(Filed Feb.) 3, 1978))No. 477 S) 272 No. 777 S) 488

APPEALS FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Gerald S. Zore, Judge

APPENDIX I
(ORDER) Appellees' Petition for Rehearing denied without opinion, this 6th day of March, 1978.

(Richard M. Givan)
CHIEF JUSTICE

ATTORNEYS FOR APPELLANTS	ATTORNEY FOR APPELLEES
DAVID R. FRICK Corporation Counsel STEPHEN GOLDSMITH Chief Trial Deputy City County Legal Division 2560 City County Building Indianapolis, Indiana 46204	JOHN R. CROMER 431 E. Hanna Avenue Indianapolis, Indiana 46227

IN THE
SUPREME COURT OF INDIANA

CITY OF INDIANAPOLIS: WILLIAM HUDNUT, As Mayor of the City of Indianapolis; FRED ARMSTRONG, As City Controller of the City of Indianapolis, Appellants (Defendants below) -vs- JOHN WRIGHT d/b/a TOUCH OF CLASS MASSAGE PARLOR and MARY KAY GILBERT, Appellees (Plaintiffs below) -vs- MARY JO KOCHER, Appellee (Intervening Plaintiff below) -vs- CONSOLIDATED CITY OF INDIANAPOLIS, Appellant (Defendant below) -vs- KARON GRIFFIN, et al., Appellees (Plaintiffs below)	(Filed Feb. 8, 1978) No. 477 S 272 No. 777 S 488

APPEALS FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Gerald S. Zore, Judge

APPENDIX J

77S272 City of Indianapolis; William Hudnut, et al
V.
John Wright, d/b/a Touch of Class Massage Parlor;
and Mary Kay Gilbert
77S488 Consolidated City of Indianapolis, V. Karon
Griffin, et al

CERTIFICATION

Cause #477S272 and
Cause #777S488

I, BILLIE R. McCULLOUGH, duly elected, qualified and acting Clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original pleadings, rulings and docket book entries as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this (10th) day of (March), (1978).

(Billie McCullough)
BILLIE McCULLOUGH, CLERK
INDIANA SUPREME COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-73

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, *et al.*,

Appellants,

vs.

CITY OF INDIANAPOLIS; WILLIAM HUDNUT, as Mayor of the City of Indianapolis; FRED ARMSTRONG, as City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Appellees.

MOTION TO DISMISS OR AFFIRM.

JAMES A. STRAIN,
STEPHEN GOLDSMITH,
1313 Merchants Bank Building,
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RICHARD S. EWING,
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Indianapolis, Indiana 46204.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6993

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TABLE OF AUTHORITIES.

STATUTES AND OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-73.

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, *et al.*,

Appellants,

vs.

CITY OF INDIANAPOLIS; WILLIAM HUDNUT, as Mayor of the City of Indianapolis; FRED ARMSTRONG, as City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Appellees.

MOTION TO DISMISS OR AFFIRM.

The appellees, the City of Indianapolis, William Hudnut, as its Mayor, and Fred Armstrong, as its City Controller, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Indiana on the grounds that (i) the appeal is untimely, (ii) the appeal presents no substantial federal question, (iii) most of the federal questions sought to be raised were not expressly passed on by either the trial court or the Indiana Supreme Court and (iv) the questions on which the judgment depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF THE CASE.

In September, 1976, the Indianapolis City-County Council duly enacted General Ordinance No. 110 which established a licensing scheme for massage parlors (the "Ordinance"). The Ordinance makes it unlawful to operate a massage parlor or similar business without a license. In addition, it imposes certain proscriptions on the operation of such businesses, and provides for the revocation of licenses in the event those proscriptions are not obeyed. Finally, it permits inspections to be made by public officials to ensure compliance with the Ordinance.

The Ordinance was passed as a consequence of the activities in and around massage parlors in Indianapolis. During the first nine months of 1976, 51 arrests and summonses were effected as a result of illegal activities taking place at the 13 massage parlors located within the Indianapolis Police Service District. It was scheduled to become effective October 15, 1976, but on October 14, 1976, two of the appellants, an owner of a licensed massage parlor and a licensed massage therapist in Indianapolis, sought and obtained a temporary restraining order from the Marion County Superior Court. On October 25, 1976, an order issued from that court permanently enjoining enforcement of sections 17-729(e), 17-729(j) and 17-727(a)(9) of the Ordinance and declaring them unconstitutional. (Appendix C)

Section 17-729(e) prohibits in licensed massage parlors the administration of any massage, alcohol rub or similar treatment, fomentation, bath or electric or magnetic treatment with certain exceptions to persons of the opposite sex. (Appendix D, p. 8d-9d) Section 17-729(j) provides that every massage parlor must be open for inspection during all business hours and at other reasonable times. (Appendix D, p. 9d) And Section 17-727 (a)(9) requires an applicant for a license to sign an agreement permitting inspection. (Appendix D, p. 7d)

In its order enjoining enforcement of the Ordinance, the Marion County Superior Court held that Section 17-729(e) was unconstitutional since it was an attempted local criminal law prohibited by Article 4, Section 22 and 23 of the Indiana Constitution, and was violative of the due process and equal protection clauses of the Indiana Constitution. Sections 17-729(j) and 17-727(a)(9) were found violative of the search and seizure proscription in the Indiana Constitution, Article I, Section 11, and in the Fourth Amendment to the United States Constitution.

On appeal, the Indiana Supreme Court reversed the trial court's judgment holding, *inter alia*, that based on its interpretation of the Indiana Constitution, for which it found federal constitutional principles persuasive, Section 17-729(e) does not violate either the Indiana Constitution's equal protection clause or its due process clause.

With respect to the search and seizure proscriptions, the Indiana Supreme Court held that Sections 17-729(j) and 17-727(a)(9) did not contravene either the Indiana Constitution or the Fourth Amendment to the United States Constitution since (i) no criminal prosecutions are authorized under the Ordinance for the refusal to permit inspections, (ii) an advance notice requirement is unreasonable given the ease with which violations could be concealed, (iii) the business being inspected has a history of regulation, (iv) a licensee in a regulated business impliedly consents to inspections at any and all reasonable times, and (v) inspections were limited to business hours and other reasonable times.

The decision of the Indiana Supreme Court was rendered on January 19, 1978. (Appendix A, p. 1a) Appellants filed their notice of appeal in the Indiana Supreme Court on February 3, 1978. (Appendix E, p. 3e) Thereafter, they timely filed a petition for rehearing on February 6, 1978. The Indiana Supreme Court denied the petition for rehearing on March 6, 1978. (Appendix I, p. 1i) No notice of appeal was filed following the denial of the petition for rehearing and the jurisdictional statement was not filed until June 7, 1978.

II.

ARGUMENT.

A. The Appeal to This Court Was Untimely.

The final judgment in the case at bar was not rendered until March 6, 1978. No notice of appeal was filed within 90 days of that judgment. Accordingly, this Court has no jurisdiction to hear the appeal. Under any interpretation of the jurisdictional question, the appeal was not docketed until June 7, 1978, more than 90 days following the rendering of final judgment. Accordingly, it was not timely docketed as required by Rule 13(1) of this Court. In either event, the appeal should be dismissed.

The jurisdictional grant of this Court's authority to review judgments of state courts is found in 28 U. S. C. § 1257 (1970), which provides, *inter alia:*

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

By reason of Rule 11 of the Rules of this Court and 28 U. S. C. § 2101(c) (1970), the notice of appeal pursuant to which the appeal may be taken must be filed within 90 days of the entry of final judgment. Failure to file the notice is a jurisdictional defect requiring dismissal of the appeal. *See, e.g., Taggart* v. *New York,* 392 U. S. 667 (1968); *Territo* v. *United States,* 358 U. S 279 (1959).

In the case at bar, the Indiana Supreme Court entered its judgment on January 19, 1978. A notice of appeal was filed February 3, 1978. In ordinary circumstances, filing of this

notice would have been timely and, assuming docketing of the appeal within 90 days of January 19, 1978, it would have complied with the rules of this Court and the statutory grant of jurisdiction. But thereafter appellants timely filed a petition for rehearing in the Indiana Supreme Court. The authorities are uniform in holding that the effect of such a petition is to "suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parites." *Department of Banking* v. *Pink,* 317 U. S. 264, 266 (1942).

Accordingly, the finality that may have existed at the time of the filing of the notice of appeal on February 3, 1978, was destroyed by appellants' own act of filing a petition for rehearing on February 6, 1978. There was no final judgment from which to appeal until the Indiana Supreme Court disposed of the petition for rehearing on March 6, 1978.[1] Since no notice of appeal was filed following the date of finality and since the 90 days allowed in Rule 11 and 28 U. S. C. § 2101 (1970) have long since passed, the appeal should be dismissed for want of jurisdiction in this Court.

Even if appellants could be considered timely to have filed their notice of appeal, their appeal was not timely docketed and, therefore, should be dismissed. Rule 13(1) of the Rules of this Court provides that a case is to be docketed in this Court not more than 90 days from judgment. Final judgment was rendered on March 6, 1978 (Appendix I), and the 90th day thereafter was Sunday, June 4, 1978. Accordingly, the final date for the filing of the jurisdictional statement was Monday, June 5, 1978. The case was not docketed, however, until June 7,

1. Appellants apparently agree with this analysis of finality. In their jurisdictional statement, they assert: "Issues were closed by the Indiana Supreme Court, and final judgment entered and effective . . . upon denial of petitioner's . . . petition for rehearing. . . ." (J. S. 3) It is from that date that they inaccurately measured the time for docketing.

1978, and even then the jurisdictional statement was defective.[2]

Appellees submit that even though late docketing of an appeal is not a jurisdictional ground for dismissal, the failure to comply with this Court's rules does supply an adequate basis for dismissal. *See, e.g., Hutten* v. *Korzen,* 409 U. S. 905 (1972); *Aero Mayflower Transit Co., Inc.* v. *United States,* 409 U. S. 905 (1972).

No matter how the various pleadings filed by appellants are considered, their appeal was not timely perfected. Appellees submit that the failure to file a notice of appeal within 90 days following the entry of final judgment, *i.e.* within 90 days following denial of appellants' petition for rehearing, leaves this Court without jurisdiction to consider the appeal. Even if there is jurisdiction, the appeal was not timely docketed under Rule 13(1). In either event it should be dismissed.

B. The Indiana Supreme Court in Upholding Section 17-729(e) Did Not Expressly Pass on Any Federal Question and Proscription of Opposite Sex Massages Presents No Substantial Federal Question.

In the trial of this action, the trial court determined that the proscription of opposite sex massages contained in Section 17-729(e) of the Ordinance contravened the due process and equal protection clauses of the Indiana Constitution. On appeal, the Indiana Supreme Court reversed these determinations. Although the appellate court found federal cases persuasive, it undertook exclusively the interpretation of the Indiana Constitution. Moreover, this Court has consistently held that the proscription of opposite sex massages presents no substantial federal question. Accordingly, as to that issue, the appeal should be dismissed.

Rule 16(1)(b) of the Rules of this Court provides, *inter alia,* that this Court will receive a motion to dismiss an appeal from

2. The defective filing is the reason this Court has deemed August 16, 1978, as the date for the filing of appellees' Motion to Dismiss or Affirm.

a state court on the ground that "the federal question sought to be reviewed was not . . . expressly passed on." In the case at bar, neither the Marion County Superior Court nor the Indiana Supreme Court expressly passed on any federal issue relating to opposite sex massages. See Appendix A, pp. 8a-12a; Appendix B, pp. 4b-5b; Appendix C, pp. 4c-5c.

Moreover, even if the Indiana Supreme Court had expressly passed on the Fourteenth Amendment issues, three recent decisions of this Court have dismissed for want of a substantial federal question cases involving precisely the issues sought to be raised by appellants' jurisdictional statement. This Court's dismissals of the appeals in *Smith* v. *Keator,* 419 U. S. 1043 (1974); *Rubenstein* v. *Cherry Hill,* 417 U. S. 963 (1974), and *Kisley* v. *City of Falls Church,* 409 U. S. 907 (1972) have disposed of the appellants' claims that (1) the Ordinance contains an invidiously sex-based classification (J. S. p. 28), (2) it unreasonably abridges the right to pursue a legitimate livelihood (J. S. pp. 23-27), and (3) it creates an impermissible irrebuttable presumption (J. S. pp. 20-27). *See, Colorado Springs Amusements, Ltd.* v. *Rizzo,* 524 F. 2d 571, 576 (CA3 1975). This Court's decision in *Hicks* v. *Miranda,* 422 U. S. 332 (1975) teaches that these dispositions were dispositions on the merits.

Appellants contend that after the dismissals in *Smith* v. *Keator, supra, Rubenstein* v. *Cherry Hill, supra,* and *Kisley* v. *City of Falls Church, supra,* the issue of opposite sex massages was given new life by the Colorado Supreme Court in *City and County of Denver* v. *Nielson,* ..... Colo. ....., 572 P. 2d 484 (1977) (*en banc*). It is urged that the *Nielson* decision has given rise to some inconsistency in the law justifying this Court's accepting jurisdiction in the case at bar. (J. S. p. 14) While it is true the Colorado Supreme Court held unconstitutional the proscription of opposite sex massages, in doing so it did nothing more than interpret its own constitutional provisions "to afford *greater* protections than the Supreme Court of the United States has recognized in its interpretation of the federal counterparts

to state constitutions." *Id.*, 572 P. 2d at 485 (emphasis added). The action of the Colorado Supreme Court, if anything, supports the notion that the Indiana Supreme Court was free to interpret the Indiana Constitution as it wished and that this Court would not interpret the federal constitution to prohibit the kind of proscription contained in 17-729(e).

Whether appellees can constitutionally proscribe opposite sex massages in connection with the licensing of massage parlors has been determined by this Court to be a question not involving a substantial federal question even when the state courts have purported to interpret the Fourteenth Amendment to the United States Constitution. There has been no demonstration of a reason to change this Court's judgment on that issue. Indeed, there is nothing in the record to suggest that in making the determination from which this appeal was taken the Indiana Supreme Court did anything more than construe Indiana's Constitution. Accordingly, this appeal should be dismissed since it fails to present a substantial federal question and since the Indiana Supreme Court did not pass on any federal constitutional issue.

C. The Appeal from the Indiana Supreme Court's Judgment Regarding the Ordinance's Inspection Procedures Should Be Dismissed for Want of a Substantial Federal Question, or the Judgment Should Be Affirmed Since the Question Presented Is So Unsubstantial As Not to Need Further Argument.

Relying principally on *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), appellants contend in this Court, as they did in the Indiana Supreme Court, that the inspection procedures established by the Ordinance contravene the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment. Appellants throughout the course of these proceedings have failed to recognize the distinction this Court has drawn between inspections in regulated

industries, as well as those with only civil consequences, and searches in criminal contexts or with criminal consequences. They have, therefore, demonstrated no cogent reason this Court should consider the constitutionality of the inspection procedures.

As the Indiana Supreme Court correctly determined, no criminal prosecutions are authorized for the refusal of a licensed massage parlor operator to permit inspections. Only the license is affected. (Appendix A, p. 15a) Thus any reliance on *Camara, supra*, by appellants is misplaced. In *Camara*, the appellant was charged with a crime for his refusal to allow a warrantless search of his residence, the use of which as a residence allegedly violated an apartment building's occupancy permit. This Court held his prosecution to be prohibited by the Fourth Amendment as applied to the states by the Fourteenth Amendment.

But this Court distinguished *Camara* in a purely civil context in *Wyman* v. *James*, 400 U. S. 309 (1971). In *Wyman*, a welfare recipient was to lose her benefits for failing to allow a caseworker to visit her home. She brought suit in federal district court contending that home visitation was a search in violation of her Fourth and Fourteenth Amendment rights in the absence of a warrant supported by probable cause or valid consent. The district court upheld her contentions, but this Court reversed.

In reversing, this Court drew the following distinction:

> "[E]ach case [*Camara, supra*, and *See* v. *City of Seattle*, 387 U. S. 541 (1967)] arose in a criminal context where a genuine search was denied and prosecution followed.
>
> "In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. . . . We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The only consequence of her refusal is that the payment of benefits ceases. . . . If a statute made her refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* and *See* would have conceivable pertinency." *Id.*, 400 U. S. at 325.

Similarly, in the case at bar, there is no threatened or available criminal prosecution for refusal to allow the inspections authorized by the Ordinance. The only consequence is that the license may be revoked. Accordingly, *Camara* has no more pertinency to the case at bar than it did to *Wyman* v. *James, supra.*

It is uncontested, indeed appellants concede, that the business of operating massage parlors is one that historically has been regulated. (J. S. 24) It has been recognized by this Court that in a regulated business, the persons engaged in the business accept both the benefits and the burdens of that regulation. *Cf. Almeida-Sanchez* v. *United States,* 413 U. S. 266, 271 (1973).

In *United States* v. *Biswell,* 406 U. S. 311 (1972), this Court sustained a criminal prosecution of a firearms dealer who submitted to the inspection of his premises on the assertion of statutory authority so to do. The inspection revealed two sawed-off rifles which the dealer was not licensed to possess.

The statutory inspection scheme there sustained, as in the case at bar, authorized official entry during business hours. In the context of dealing in firearms, this Court determined that if inspections were to be effective, unannounced, even frequent, inspections were necessary. *Id.,* 406 U. S. at 316. Indeed, the prerequisite of a warrant could frustrate inspection, and the protections to be afforded by a warrant would be negligible. *Id.* Moreover, since dealers engaged in the sale of firearms did so with the knowledge that business records, firearms, and ammunition would be subject to effective inspection, inspections for compliance posed only limited threats to the dealer's justifiable expectations of privacy. *Id.*

No less than in *Biswell,* massage parlor operators know they are in a regulated business and that they will be subjected to inspection. Indeed, they are required to consent to inspections to be licensed. No less than in *Biswell,* the inspection procedures are limited in time, place and scope. No less than in *Biswell,* an inspection procedure must be flexible to force compliance with the Ordinance since violations can so easily be hidden or

stopped. If anything, the inspection procedures authorized by the Ordinance are less objectionable and more reasonable than those upheld in *Biswell* since no criminal prosecution can flow from the refusal to allow inspections.

In short, appellants have demonstrated no reason why this Court should review an inspection scheme that is no more onerous than the one held not violative of the Fourth Amendment in *Biswell.* Accordingly, either their appeal presents no substantial federal question, or the question is so unsubstantial as not to warrant further argument. Accordingly, either the appeal should be dismissed or the judgment affirmed.

III.

CONCLUSION.

For the foregoing reasons, appellees respectfully move this Court either to dismiss this appeal or affirm the judgment of the Indiana Supreme Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-73

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, et al.,

Appellants

-vs-

CITY OF INDIANAPOLIS; WILLIAM HUDNUT, as Mayor of the City of Indianapolis; FRED ARMSTRONG, as City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Appellees

RESPONSE TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I.
STATEMENT OF THE CASE

Your appellants rely upon their statement of the case as set forth in the jurisdictional statement filed with this Court.

The appellants, in this statement of the case, would also like to take issue with certain portions of the statement of the case set forth by the appellees in their motion to dismiss or affirm.

In paragraph 2, of the appellees' statement of the case, the appellees stated:

> "During the first nine months of 1976, 51 arrests and summonses were effected as a result of illegal activities taking place at the 13 massage parlors located within the Indianapolis Police Service District."

This statement is merely a conclusion set forth by the City of Indianapolis, which was not allowed into evidence, or made a part of their record at the trial Court proceedings. At the trial Court proceedings, the City attempted to introduce evidence of 51 arrests and summonses taking place at the 13 massage parlors, but this was not allowed into evidence in that there were no convictions alleged or shown resulting from these arrests, and also it was not shown by the City that any of these arrests took place at any of the appellants' places of business, nor were any of the

appellants or individuals of this lawsuit involved in any of the 51 arrests and summonses alleged by the City. As these facts are not in evidence, nor a part of the record herein, it is the appellants' contention that they are not relevant nor should they be made a part of the statement of the case presented to the United States Supreme Court for its jurisdictional determination.

II.
ARGUMENT

A. THE APPEAL TO THIS COURT WAS TIMELY

The appellees state in their motion to dismiss or affirm filed with this Court, that the final judgment in the case at barr was not rendered until March 6, 1978. The appellees also state that no notice of appeal was filed within 90 days of the judgment, and that accordingly, this Court has no jurisdiction to hear the appeal.[1]

1. Appellees' motion to dismiss or affirm, page 4.

The appellants would point out that the Court's denial of their petition for rehearing and remand was on the 6th day of March, 1978, but that the opinion and rulings of the Indiana Supreme Court were not certified by the Clerk of said Court until the 10th day of March, 1978, as indicated in the appellants' jurisdictional statement.[2]

The docketing of this cause on the 7th day of June, 1978, is within the 90 day time limitation and therefore renders this appeal to the Supreme Court timely. Notice of appeal had been filed prior thereto by the appellants as admitted in the appellees' motion to dismiss or affirm on page 3.

It is the appellants' contention that under Indiana law the final action of the Indiana Supreme Court, and the entry of the judgment therein and its validation is done when the Clerk of said Court certifies the same. This was not done until the 10th day of March, 1978, as indicated by Appendix J to appellants' jurisdictional statement.

2. Jurisdictional statement, page 3.

United States Supreme Court Rule 13, setting forth the procedure and time limitations for docketing cases, states:

> "1. Not more than 90 days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, . . ."

It is the appellants' contention that this same was complied with by the appellants when they filed their jurisdictional statement within 90 days of the certification of the judgment and opinion of the Indiana Supreme Court by the Clerk of the same.

Appellate Rule 15, of the Indiana Rules of Appellate Procedure, sets forth rules on opinions, powers, and conduct of the Court on appeal; and miscellaneous provisions, states:

> "(B). CERTIFICATION OF OPINIONS AND MEMORANDUM DECISIONS. The Clerk shall send an uncertified copy of the opinion, opinions or memorandum decision of the Court of Appeals or the opinion or opinions of the Supreme Court to the attorneys of record at the time the opinion, opinions, or memorandum decision on appeal is handed down.

> Opinions and memorandum decisions shall not be certified to the Court below by the Clerk of this Court until the expiration of the time within which a petition for a rehearing may be filed and a petition for transfer may be filed, except upon a filing of a waiver in such a case. Upon the denial of a petition for a rehearing, in event no petition to transfer is filed within the time allowed, the Clerk of this Court shall thereupon certify the opinion or memorandum decision to the Court below, at the expiration of such time. In event a petition to transfer is filed the opinion or memorandum decision shall be certified upon the denial of such petition to transfer; if the petition to transfer is granted no memorandum decision or opinion shall be certified until the final disposition of the case in the Supreme Court.
>
> (C) DELIVERY OF OPINIONS TO REPORTER. The opinions of the Court of appeal shall not be delivered to the Reporter until the opinion has been certified to the trial Court."
>
> (Our emphasis)

It is the appellants' contention that based upon a reading of Appellate Rule 15 of the Indiana Rules of Appellate Procedure, that the date of certification by the Clerk of the Supreme Court is the date of the final entry by the Supreme Court of Indiana. The Rule itself states that the

Clerk shall send an uncertified copy of the opinion to the attorneys of record at the time the opinion is handed down, and also states that opinion and memorandum decisions shall not be certified to the Court below until the expiration of time for the petition for rehearing and all other matters has passed. The decision can not be certified until the final disposition of the case in the Supreme Court. Based upon the reasonable interpretation of this Rule, it is the appellants' contention that the certification of the opinion and decision of the Supreme Court by the Clerk of that Court is the final entry in the matter, and the 90 day appeal time begins to run at such date. In this case, the certification of the Supreme Court opinion and memorandum was made on the 10th day of March, 1978, by the Clerk of the Supreme Court. The 90 day period therefore had not run by the 7th day of June, 1978, and the filing and docketing of this appeal was timely. It is also the appellants' contention, that based upon the wording of Section

(B) of Appellate Rule 15, of the Indiana Rules of Appellate Procedure, wherein it is stated that the opinion of the Court shall not be certified to the Reporter until the opinion has been certified to the trial Court, lends further credence to the fact that such certification is the final entry by the Court, and the date upon which the appeal time must be calculated.

The appellants also refer the Court to Indiana Code 33-15-1-5 (Burns 49-2105), wherein it is stated:

> "CERTIFICATION OF OPINION. Such Clerk shall certify any opinion decision and judgment of the Supreme Court of the State of Indiana. . . to the lower Court from which the cause was appealed, . . . the Clerk of the Court from which the cause was appealed, upon receipt of such certification, shall file the same with the papers in the cause, and the Judge of such Court shall order such opinion, decision and judgment, including the certification thereof, spread of record in the order book of the Court forthwith."

Appellants again cite this provision of the Indiana Code to the Court of Appeals as lending further weight to the contention that the certification of the opinion by the Clerk of the Supreme Court is the last entry thereof,

and the entry which makes said order, opinion or memorandum valid and binding as law in the State.

Appellants also refer the Court to the provisions of Indiana Code 34-3-13-1 (Burns 2-1610), a provision of the Indiana Rules of Civil Procedure setting forth that provisions wherein provisions of the Supreme Court be used as evidence in a cause, wherein it is stated:

> "DECISIONS OF SUPREME COURT. In all cases where a certified copy of the decisions of the Supreme Court of the State of Indiana would be competent evidence in any of the Courts of the State, . . . shall be competent evidence in such Courts, the same is a certified copy of the decisions from the Clerk's office of the Court under seal thereof."

Based upon the above cited provisions of the Indiana Code, and the Indiana Rules of Appellate Procedure, appellants contend that it is clear from the reading of such that the last official act of the Supreme Court, and the last entry thereon from which the 90 day appeal time period must be calculated is the

certification by the Clerk of the Supreme Court of the opinion. As indicated by Appendix J to the appellants' jurisdictional statements, this certification was given by the Clerk of the Supreme Court of Indiana on the 10th day of March, 1978. As such, appeal of this matter, and docketing of the same with the Supreme Court of the United States was timely. Entry of the final act of the Supreme Court of Indiana, and entry of the final judgment is done upon certification of the same by said Clerk.

Appellees are wrong in their assumption on page 5, of the appellees' motion to dismiss or affirm wherein they state in footnote 1 "appellants apparently agree with this analysis of finality." Appellants in their jurisdictional statement set out that the final entry of the Supreme Court, and the date of the final judgment entry upon which the appeal time was calculated was the 10th day of March, 1978, and not the 6th day of March, 1978. A reading of the appellants' jurisdictional statement will bring this issue to light.

The notice of appeal which was filed with the

Indiana Supreme Court prior to the petition for rehearing is sufficient to meet the qualifications and procedures set forth in the Indiana Rules of Appellate Procedure, and also the procedures and actions mandated prior to appeal by the rules of the United States Supreme Court. As such, all necessary qualifications and requirements and procedures for perfecting appeal to this Court were done by appellants, and the same was timely.

B. THE DECISION OF THE INDIANA SUPREME COURT, AND THE ERRORS SET OUT AND ALLEGED AND BROUGHT BEFORE THIS COURT, DO PRESENT SUBSTANTIAL FEDERAL QUESTIONS.

In support of its allegation that this appeal contains important and substantial federal questions, the appellants rely upon the jurisdictional statement previously filed with the Court. The City of Indianapolis Massage Parlor Ordinance, as set out in full in Appendix A, of the appellants' jurisdictional statement, violates the equal protection and due process provisions of the United States and Indiana Constitutions, and certain sections of said ordinance also violates provisions

against unreasonable searches and seizures as set forth in the 4th Amendment of the United States Constitution.

As stated in the appellants' jurisdictional statement, the cases similar to this one have been the subject to extensive litigation in various jurisdictions, and the results and conclusions of the various jurisdictions in Courts in interpreting these provisions of "massage parlor ordinances" has left the law, and the constitutional rights of individuals and businesses in confusion and limbo, and these constitutional rights and privileges need to be determined by the Supreme Court in order that the individuals and businesses involved may be informed and apprised of their constitutional rights and priviliges in operating these businesses and conducting and pursuing the livelihood and profession which they have chosen. The results of the various decisions in the jurisdictions as quoted in the appellants' jurisdictional statement has thrown into total confusion the 14th Amendment rights concerning due process and equal protection, and the 1st and 4th Amendment rights con-

cerning the right of privacy and the right to be free from unreasonable searches and seizures throughout the different states and jurisdictions in this land. The United States Constitution, as the supreme document governing and guaranteeing rights to each and every individual and business in the United States, is the supreme interpretation of these rights and the final resting place for these rights, liberties and privileges to be determined. If the rights guaranteed under the United States Constitution are to be common and extended to all citizens and businesses, the interpretation of the same on a national level by the Supreme Court is needed to insure these guaranteed rights and privileges, and vest the same to each and every individual. Massage parlor ordinances such as the one in contention herein, containing the "prohibition of bi-sexual massage provisions", deny basic fundamental rights guaranteed to individuals and businesses by the United States Constitution, and the only authority to settle in finality the issues contended herein is

the Supreme Court of the United States.

The fact that cities and municipalities engage in unreasonable presumptions in enacting these ordinances, based upon alleged illicit sexual activity which cannot be proved at trial in itself denies basic constitutional rights. The additional fact that cities in these instances have reasonable alternative methods of enforcing the criminal laws of the State, which are in existence and have been held valid is further reason for the Supreme Court to review the allegations contained in the jurisdictional statement and make a ruling thereon concerning fundamental rights guaranteed to appellants.

The contentions by the appellants that inspection provisions of the ordinance are violative of the 4th Amendment guarantees of the United States Constitution are valid. In the case of Barlow's, Inc. v. Usury, (D.C. Idaho, 1976) 424 F. Supp. 437, the United States District Court declared that O.S.H.A. inspection provisions which attempted to authorize warrantless inspections of businesses were violative of the 4th Amendment and therefore unconstitutional and invalid as invasions of privacy in authorizing illegal and

unreasonable searches and seizures. The provisions of the O.S.H.A. inspection provisions are very similar in make up, design, and enforcement to those provisions found in municipal ordinance herein. As such, again, to determine constitutional rights, and to effectively express said rights to that appellants and individuals may know their rights and privileges under the United States Constitution, the United States Supreme Court should determine in finality whether provisions of this sort operate to deny basic constitutional rights. The decision by the Indiana Supreme Court in direct contradiction to decisions of other Courts concerning interpretation of the 4th Amendment, again leaves the state of this constitutional provision in confusion and imbalanced throughout the several states.

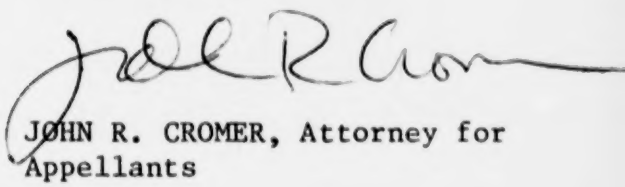
As such, substantial federal questions are presented for the Court to determine, and

jurisdiction of the same should be noted by the Supreme Court, and their opinion and ruling thereon in determining the constitutional rights of individuals and businesses and appellants herein is in order.

III.
CONCLUSION

For the foregoing reasons, appellants respectfully move this Court to assume jurisdiction in this matter, resolve the same by judgment, opinion or order, and define the rights of the appellants herein.

Respectfully submitted,



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